SUBMITTED

TRANSCRIPT OF RECORD.

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted]224

DIE DEUTSCHE BANK FILIALE NURNBERG,
PETITIONER,

vs.

CHARLES FRANKLIN HUMPHREY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1925

CERTIORARI GRANTED NOVEMBER 23, 1925

(31,487)

(31,487)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 764

DIE DEUTSCHE BANK FILIALE NURNBERG, PETITIONER,

vs.

CHARLES FRANKLIN HUMPHREY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION**

No. 630

CHARLES FRANKLIN HUMPHREY, Plaintiff,

vs.

THOMAS W. MILLER, Alien Property Custodian for the United States of America, Defendant

[fol. 2] BILL OF COMPLAINT—Filed July 9, 1921

Plaintiff above named complains of the defendant above named, and for cause of action alleges:

I

That plaintiff is a native-born citizen of the United States of America, and is now, and at all the times herein mentioned was a citizen and a resident of the State of California, and the territory embraced within the said Southern Division of the United States District Court for the Northern District of California.

II

That the defendant, Thomas W. Miller, is the Alien Property Custodian for the United States of America under and pursuant to that certain Act of Congress known as the "Trading with the Enemy Act," enacted October 16, 1917, and the acts amendatory thereof and supplementary thereto.

III

That Die Deutsche Bank Filiale Nurnberg, in Nurnberg, Germany, was on the 24th day of November, 1914, and for a long time prior thereto and ever since has been, and is now, a banking corporation located and having its principal place of business in Nurnberg, Germany, and organized and doing business in Germany under and by virtue of the laws of Germany; and, as plaintiff is informed and

believes and so alleges the fact to be, its stockholders are [fol. 3] mainly composed of individuals, who are now and at all times herein mentioned were citizens of Germany and residents therein.

IV

That prior to November 24, 1914, plaintiff had deposited with said Die Deutsche Bank Filiale in Nurnberg, Germany, sums of money, which on said November 24, 1914, aggregated the sum of Seventy-eight Thousand Three Hundred Eight and 65/100 (78,308.65) German marks, lawful money of Germany.

That said sum of money was so on deposit in said Die Deutsche Bank Filiale, Nurnberg, on said 24th day of November, 1914, to the order of plaintiff, or plaintiff's wife, and that neither plaintiff, nor plaintiff's wife, has drawn on said funds since said time, and that no part thereof has been paid to plaintiff, or plaintiff's wife, or to their order, or to the order of both or either of them, and that the wife of plaintiff has in writing assigned all her right, title, interest, and claim, in or to said money or property to plaintiff long previous to the filing of plaintiff's claim with defendant as hereinafter alleged; and that the whole of said sum of 78,308.65 German marks, together with interest thereon as hereinafter specified, remains due, owing and unpaid by said Die Deutsche Bank Filiale, Nurnberg to plaintiff.

V

That said sum of money was and is so on deposit under [fol. 4] and upon the agreement with said Die Deutsche Bank Filiale that the said fund, or any part remaining on deposit, should bear interest at the rate of 4% per annum, and said bank so agreed to pay said interest; and that said 4%, or any part thereof, has not been paid, and that the said interest at the rate of 4% upon said 78,308.65 marks, and the whole thereof, is now due, owing and unpaid from said Die Deutsche Bank Filiale, to plaintiff.

VI

That as plaintiff is informed and believes, and so alleges the fact to be, defendant had in his possession on the 16th day of October, 1919, moneys aggregating the sum of Thirty-four Thousand Five Hundred Eight and 13/100

($34,508.13) Dollars, paid to said defendant theretofore as the moneys of, and belonging to, and which were and are the property of the said Die Deutsche Bank Filiale, Nurnberg; and that the same has ever since been and now is in the possession and under the control of defendant.

VII

That on the — day of October, 1918, plaintiff filed with defendant plaintiff's notice of claim, under oath and in such form and containing such particulars as required by, and pursuant to Section 9, of said "Trading with the Enemy Act," for the said sum of money hereinbefore specified and described as owing to plaintiff from and by said Die Deutsche Bank, Filiale, Nurnberg, Germany;

And that subsequently, and on the 24th day of January, 1920, pursuant to the provisions of said Act and the regula-[fol. 5] tions thereunder made, plaintiff made application to the President of the United States of America for the allowance of said claim, but that no action whatever has been taken upon said application; and that said Die Deutsche Bank Filiale Nurnberg has failed and refused to consent to the transfer of said moneys in possession of said defendant to plaintiff to the extent of plaintiff's claim against said Die Deutsche Bank Filiale, Nurnberg.

That on the 6th day of April, 1917, the Congress of the United States declared war against Germany, and a state of war has existed ever since said day, up to July 2, 1921; and that at the time of said declaration of war, a German mark was worth 18½¢ in lawful money of the United States of America.

That ever since said 6th day of April, 1917, and up to July 2, 1921, said Die Deutsche Bank Filiale, Nurnberg, was and has been an alien enemy as defined by said Act of Congress enacted October 16, 1917, and known as "Trading with Enemy Act," and the acts amendatory thereof and supplemental thereto.

Wherefore, pursuant to the statutes in such cases made and provided, plaintiff has filed this suit for the purpose of obtaining a judgment of this court establishing plaintiff's right to have the said debt owing to him by said Die Deutsche Bank Filiale, Nurnberg, paid out of the moneys of

said Die Deutsche Bank Filiale, Nurnberg, so in the possession of defendant; and plaintiff prays the judgment of [fol. 6] this Court in favor of plaintiff and requiring the defendant to pay to plaintiff the debts so owing him by said Die Deutsche Bank Filiale of Nurnberg, Germany, out of said moneys so in the possession of defendant, at the rate of 18 1/2c lawful money of the United States of America for every mark of German money so owing to plaintiff, as aforesaid; and plaintiff further prays for an order of this Court requiring defendant to retain during the pendency of this action sufficient of said moneys of said Die Deutsche Bank Filiale, Nurnberg, so in his possession, to meet any judgment that may be rendered herein; and that plaintiff have such other and further relief as may be meet and proper in the premises.

Wm. P. Hubbard, Grant & Zimdars, Attorneys for Plaintiff.

Duly sworn to by Charles Franklin Humphrey. Jurat omitted in printing.

[fol. 7] [File endorsement omitted.]

In United States District Court

Charles Franklin Humphrey, Plaintiff,

vs.

Thomas W. Miller, as Alien Property Custodian for the United States of America; Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg (a Corporation), Defendants.

Amended Bill of Complaint—Filed September 7, 1921

Comes now the plaintiff herein, and by leave of Court first had and obtained, files this as his amended complaint, and for cause of action, alleges:

I

That plaintiff is a native-born citizen of the United States [fol. 8] of America, and is now, and at all the times herein mentioned was a citizen and a resident of the State of Cali-

fornia, and the territory embraced within the said Southern Division of the United States District Court for the Northern District of California.

II

That the defendant, Thomas W. Miller is the Alien Property Custodian for the United States of America under and pursuant to that certain Act of Congress known as the "Trading with the Enemy Act," enacted October 16, 1917, and the acts amendatory thereof and supplemental thereto.

III

That defendant, Frank White, is now and at all times herein mentioned was treasurer of the United States of America.

IV

That Die Deutsche Filiale Nurnberg, in Nurnberg, Germany, was on the 24th day of November, 1914, and for a long time prior thereto, and ever since has been, and is now, a banking corporation located and having its principal place of business in Nurnberg, Germany, and organized and doing business in Germany under and by virtue of the laws of Germany; and, as plaintiff is informed and believes and so alleges the fact to be, its stockholders are mainly composed of individuals, who are now and at all times herein mentioned were citizens of Germany and residents therein.

V

That prior to November 24, 1914, plaintiff had deposited [fol. 9] with said Die Deutsche Bank Filiale in Nurnberg, Germany, sums of money, which on said November 24, 1914, aggregated the sum of seventy-eight thousand three hundred eight and 65/100 ($78,308.65) German marks, lawful money of Germany.

That said sum of money was so on deposit in said Die Deutsche Bank Filiale, Nurnberg, on said 24th day of November, 1914, to the order of plaintiff, or plaintiff's wife, and that neither plaintiff, nor plaintiff's wife, has drawn on said funds since said time, and that no part thereof has been paid to plaintiff, or plaintiff's wife, or to their order, or to the order of both or either of them, and that the wife of plaintiff has in writing assigned all her right, title, inter-

est, and claim, in or to said money or property to plaintiff long previous to the filing of plaintiff's claim with defendant, Thomas W. Miller, as such Alien Property Custodian, as hereinafter alleged; and that the whole of said sum of 78,308.65 German marks, together with interest thereon as hereinafter specified, remains due, owing and unpaid by said Die Deutsche Bank Filiale, Nurnberg, to plaintiff.

VI

That said sum of money was and is so on deposit under and upon the agreement with said Die Deutsche Bank Filiale that the said fund, or any part remaining on deposit, should bear interest at the rate of 4% per annum, and said bank so agreed to pay said interest; and that said 4%, or any part thereof, has not been paid, and that the [fol. 10] said interest at the rate of 4% upon said 78,308.65 marks, and the whole thereof, is now due, owing and unpaid from said Die Deutsche Bank Filiale, to plaintiff.

VII

That as plaintiff is informed and believes, and therefore alleges, defendant, Thomas W. Miller as such Alien Property Custodian, and defendant, Frank White, as Treasurer of the United States, had in their possession on the 16th day of October, 1919, moneys aggregating the sum of thirty-four thousand five hundred eight and 13/100 ($34,508.13) dollars, paid to said defendants ther-tofore as the moneys of, and belonging to, and which were and are property of the said Die Deutsche Bank Filiale, Nurnberg; and the same ever since has been and is now held by said defendants, Thomas W. Miller, as such Alien Property Custodian, and Frank White, as such Treasurer of the United States of America.

VIII

That on the — day of October, 1918, plaintiff filed with defendant, Thomas W. Miller, as Alien Property Custodian, plaintiff's notice of claim, under oath and in such form and containing such particulars as required by, and pursuant to Section 9, of said "Trading with the Enemy Act," for the said sum of money hereinbefore specified and described as owing to plaintiff from and by said Die Deutsche Bank Filiale, Nurnberg, Germany.

And that subsequently, and on the 24th day of January, 1920, pursuant to the provisions of said Act and the regu-[fol. 11] lations thereunder made, Plaintiff made application to the President of the United States of America for the allowance of said claim, but that no action whatever has been taken upon said application; and that said Die Deutsche Bank Filiale Nurnberg has failed and refused to consent to the transfer of said moneys by said Thomas W. Miller as such Alien Property Custodian, and said Frank White, as Treasurer of the United States of America, to plaintiff to the extent of plaintiff's said claim against said Die Deutsche Bank Filiale, Nurnberg, or to any extent.

That on the 6th day of April, 1917, the Congress of the United States declared war against Germany; and a state of war has existed ever since said day, up to July 2, 1921; and that at the time of the said declaration of war, a German mark was worth 18½¢ in lawful money of the United States of America.

That ever since said 6th day of April, 1917, and up to July 2, 1921, said Die Deutsche Bank Filiale, Nurnberg, was and has been an alien enemy as defined by said Act of Congress enacted October 16, 1917, and known as "Trading with the Enemy Act," and the Acts amendatory thereof and supplemental thereto.

IX

That defendant, Die Deutsche Bank Filiale, Nurnberg, claims to have some right, title, or interest in or to said moneys adverse to the plaintiff, but that such interest *in* [fol. 12] without any basis in fact, fictitious, and subordinate, and subject to the prior right and claim of plaintiff herein.

Wherefore, pursuant to the statutes in such cases made and provided, plaintiff has filed this suit for the purpose of obtaining a judgment of this Court establishing plaintiff's right to have the said debt owing to him by said Die Deutsche Bank Filiale, Nurnberg, paid out of the moneyes of said Die Deutsche Bank Filiale, Nurnberg, so in the possession of defendants, Thomas W. Miller, as such Alien Property Custodian, and said Frank White, as such Treasurer of the United States of America, and plaintiff prays the judgment of this Court in favor of plaintiff and requiring the said defend-

ants to pay to plaintiff the debts so owing him by said Die Deutsche Bank Filiale of Nurnberg, Germany, out of said moneys so in the possession of defendants, Thomas W. Miller, Alien Property Custodian, and Frank White, Treasurer of the United States of America, at the rate of 18 1/2¢ lawful money of the United States of America for every mark of German money so owing to plaintiff, as aforesaid; and plaintiff further prays for an order of this Court requiring said last-named defendants to retain during the pendency of this action sufficient of said moneys of said Die Deutsche Bank Filiale, Nurnberg, so in their possession, to meet any judgment that may be rendered herein; that it be decreed that said defendant, Die Deutsche Bank Filiale, Nurnberg, has no right, title, claim, or interest in or to said moneys claimed herein by plaintiff, or any part [fol. 13] thereof; and that plaintiff have such other and further relief as may be meet and proper in the premises.

Wm. P. Hubbard, Grant & Zimdars, Attorneys for Plaintiff.

[File endorsement omitted.]

Duly sworn to by Charles Franklin Humphrey. Jurat omitted in printing.

[fol. 14] In United States District Court

Answer of Thomas W. Miller et al.—Filed November 30, 1921

Come now defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally answering the amended bill of complaint on file herein and as and for their separate and several answers thereof say:

I

They have no information or belief upon the subject that is sufficient to enable them to answer the averments in paragraph one in said complaint contained, and these defendants, placing their denial upon that ground, deny each and all of said mentioned averments and every part thereof, and therefore demand strict proof thereof.

II

They admit the averments of paragraph two of said amended bill of complaint.

III

They admit that Frank White is now the Treasurer of the United States and say that Frank White has not been Treasurer of the United States at all times mentioned in the amended bill of complaint.

IV-V

Allege that they have no information or belief upon the subject sufficient to enable them to answer averments in [fol. 15] paragraphs four and five in said amended bill of complaint contained, and placing their denials upon that ground, deny each and all of said mentioned averments and every part thereof, and therefore demand strict proof thereof.

VII

Answering the averments of paragraph seven of said amended bill of complaint these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereof, and the proclamation and executive orders issued thereunder, after investigation determined that the Deutsche Bank of Nurnberg, Germany, was an enemy within the purview and meaning of the said Act and that said money and other property was owing or belonging to, held for, by, on account of, and for the benefit of the said enemy. Thereafter the Alien Property Custodian required that the said money and other property be transferred, assigned, delivered and or paid to him as Alien Property Custodian, to be by him held, and accounted for pursuant to law and the said requirement was duly complied with. The Alien Property Custodian, acting pursuant to the said Act, paid into the Treasury of the United States all the money paid to him as the money of the Deutsche Bank of Nurnberg, Germany.

Further answering said paragraph seven, these defendants say that the transmission of the Alien Property Custodian of the enemy ownership of the said money and other

property is not final for the purposes of this suit, and [fol. 16] the plaintiff herein must prove, and this Court must determine, out of what, if any, of the said money and other property above described, the plaintiff herein may secure payment of any debt which he may establish.

VIII

Answering the averments of paragraph eight of said amended bill of complaint these defendants admit that the plaintiff herein filed with the Alien Property Custodian a notice of his claim under oath and in such form and containing such particulars as required by the Alien Property Custodian. These defendants deny that the plaintiff has ever filed herein an application to the President of the United States for the allowance of said claim, but these defendants say that whether or not the plaintiff herein has filed such an application is immaterial and irrelevant for the purpose of this suit, unless such application was filed a shorter time than sixty days prior to the filing of the bill of complaint. These defendants admit that on April 6, 1917, war was declared between the United States and Germany, but as to the allegation relative to the termination of the said war, these defendants say that the same is a statement of law which they are not required to answer.

These defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the allegations in paragraph eight of said amended bill of complaint as to the value of the German mark at the date of the declaration of war between the United States and Germany and basing their denial upon that ground deny [fol. 17] each and all of the said allegations and demand strict proof thereof, and these defendants say that such value is immaterial and irrelevant for the purposes of this suit, and that whatever amount this plaintiff may show that he is entitled to must be computed in United States money at the rate of exchange existing at the date any judgment or decree may be rendered in this cause.

Whether or not the Deutsche Bank Filiale of Nurnberg, Germany, was and has been an enemy as defined by the Act of Congress approved October 6, 1917, is a question of law which these defendants are not required to answer.

Wherefore these defendants having fully answered the amended bill of complaint, pray that they be dismissed with their costs in this behalf expended, and for such other or further relief to which in the premises they may be entitled.

John T. Williams, United States Attorney; E. M. Leonard, Asst. United States Attorney, Solicitors for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

Received copy of the above this 29th day of November, 1921.

Wm. P. Hubbard and Grant & Zimbars, Attys. for Plff.

[fol. 18] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DIE DEUTSCHE BANK FILIALE NURNBERG—Filed June 12, 1922

Now comes Die Deutsche Bank Filiale Nurnberg, a corporation, one of the defendants above named, and for itself, and for no other defendant, answering the amended complaint of plaintiff on file herein, admits, denies and alleges as follows:

I

Alleges that this defendant has no knowledge or informa-[fol. 19] tion sufficient to form a belief concerning the allegations contained in paragraph I of said amended complaint, and it therefore demands strict proof thereof.

II

Admits all of paragraphs II, III and IV of said complaint.

III

Denies that prior to November 24, 1914, or at any other time, plaintiff had deposited with this defendant, in Nurnberg, Germany, sums of money which on said November 24,

1914, or at any other time, aggregated the sum of 78,308.65 German marks, lawful money of Germany, or any other sum, as hereinafter alleged.

Denies that said sum of 78,308.65 marks, or any other sum, save as hereinafter alleged, was on said 24th day of November, 1914, or at any other time, on deposit with this defendant, to the order of said plaintiff or plaintiff's wife; denies that no part of the funds on deposit with this defendant to the order of plaintiff and his said wife, have been paid to plaintiff or plaintiff's wife, or to the order of both or either of them since November 24, 1914.

Concerning the allegations contained in lines 21 to 25, and including the word "alleged," at page 2 of said amended complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief with regard thereto, and it therefore demands strict proof thereof.

Denies that the sum of 78,308.65 German marks, or any other sum save as hereinafter alleged, or any sum as in- |fol. 20| terest save as hereinafter alleged, remains due, owing and unpaid, or due, or owing or unpaid, from this defendant to plaintiff.

IV

Denies that said sum of 78,308.65 German marks, or any other sum, was or is on deposit with this defendant under or upon the agreement with this defendant that said, or any sum, or any part remaining on deposit, should bear interest at the rate of 4% per annum, or at any other rate save as hereinafter alleged; denies that this defendant agreed to pay interest as alleged in paragraph VI of said amended complaint; denies that this defendant has not paid any interest to plaintiff since November 24, 1914; denies that interest at the rate of 4% upon the sum of 78,308.65 German marks, or any other rate on any other sum, save as hereinafter alleged, is now due, or owing or unpaid from this defendant to plaintiff.

V

Further answering said amended complaint, this defendant alleges that on or about the 7th day of January, 1914, the plaintiff herein and his wife, Elizabeth Humphrey, opened an account with this defendant in their joint names at Nurnberg, Germany, by depositing with this defendant

the sum of 10.50 marks, lawful money of the Imperial German Government; that at said time and place this defendant promised and agreed to repay to said plaintiff and his said wife, upon their joint demand first duly made upon this defendant, at its place of business at said Nurnberg, Germany, the said amount, together with any sums which [fol. 21] might thereafter be deposited in said account, payment to be made in marks, lawful money of the German Government, or if payment should be made in any country other than Germany then in the money of such other country, at the rate of exchange prevailing at the time of such payment; that upon receiving said sum this defendant agreed to pay to said plaintiff and his said wife, interest upon sums on deposit in said account at the rate or rates prevailing from time to time in said Nurnberg, Germany, with reference to similar accounts; that subsequent to said 7th day of January, 1914, certain sums were deposited in said account and certain sums were withdrawn therefrom, so that on the 24th day of November, 1914, there remained on deposit with this defendant in said account, the sum of 529.80 German marks, and no more.

That on the 6th day of January, 1915, the sum of 19,980 German marks, and thereafter other and further sums were deposited in said account and certain charges and expenses paid by this defendant for the account of said plaintiff and his said wife, were deducted therefrom, so that there remained on deposit with this defendant in said account, on the 30th day of June, 1917, the sum of 22,955.20 marks. That the interest upon sums on deposit in said account, as agreed to be paid by this defendant amounted on the 30th day of June, 1917, to the further sum of 905.60 marks; that the rate of interest payable upon said account for eighteen months prior to said 30th day of June, 1917, was 1½% per annum.

[fol. 22] This defendant alleges that there were no sums on deposit with this defendant at said Nurnberg, Germany, to the credit of plaintiff and or his said wife, during the times mentioned in said complaint other than as alleged in this paragraph of this answer.

VI

This defendant has no knowledge or information concerning the allegations contained in paragraph VII of said com-

plaint, and it therefore demands strict proof thereof. Further answering said paragraph VII, this defendant alleges that the determination of the enemy character and of the enemy ownership of the moneys referred to in said paragraph, made by the said Alien Property Custodian, is not final for the purposes of this suit, and that the plaintiff herein must offer proof as to said ownership and enemy character, and that this court must determine out of what, if any of the said moneys, any claim which the plaintiff may establish hereunder must be paid.

VII

This defendant alleges that it has no knowledge or information sufficient to form a belief with regard to the allegations contained in lines 20 to 31, to and including the word "application," at page 3 of said amended complaint, and it therefore demands strict proof thereof. This defendant denies that it has refused to consent to the transfer of the moneys referred to in paragraph VII of said complaint by said Thomas W. Miller, as Alien Property Custo- [fol. 23] dian, or by said Frank White, as Treasurer of the United States of America, to plaintiff to the extent of plaintiff's alleged claim against this defendant, or to any extent, and in this behalf this defendant alleges that no demand has been made upon it by said plaintiff with reference to such transfer prior to the commencement of this action.

This defendant has no knowledge or information sufficient to form a belief as to the value of the German mark at the date of the declaration of war between the United States and Germany, and this defendant further alleges such value is immaterial and irrelevant for the purpose of this suit, and that whatever amount this plaintiff may show that he is entitled to, must be computed in money of the United States at the rate of exchange existing at the date of any judgment or decree rendered in this cause.

VIII

This defendant admits that it claims to have some right, title or interest in or to the moneys referred to in paragraph VII of said complaint, but denies that such interest is without any basis in fact and fictitious and subordinate, or fictitious or subordinate, or subject to the prior right and claim, or right or claim, of the plaintiff herein.

For Its Second Defense

This defendant alleges that the averments of fact contained in said amended bill of complaint are insufficient to constitute a cause of action, for the reason that it does not affirmatively appear that any demand or order has been [fol. 24] made upon this defendant by or on behalf of said plaintiff, for the payment of the whole or any part of the sum alleged to be on deposit with this defendant to the order of plaintiff. And this defendant alleges that no demand has been made upon it by or on behalf of said plaintiff for the payment of the whole or any part of the sum of 22,955.20 marks, referred to in paragraph V of his answer prior to commencement of this action.

For Its Third Defense

This defendant alleges that there is a defect of parties plaintiff in that it affirmatively appears upon the face of said amended bill of complaint that the wife of said plaintiff, Elizabeth Humphrey, should be made a party plaintiff.

For Its Fourth Defense

This defendant alleges that the Southern Division of the District Court of the United States, in and for the Northern District of California, does not have jurisdiction of the subject of this action for it affirmatively appears that this proceeding is one in rem wherein said Court is asked to sequester certain specific moneys which were not, at the commencement of this action and which are not now, within the Northern District of California, but which were, at the commencement of this action, and which now are, situate and located at and within the District of Columbia and over which this Court has no jurisdiction, power or control, for the purpose of ordering the same to be transferred, de- [fol. 25] livered or paid to the plaintiff herein in satisfaction of any debt or sum which may be found due and owing the plaintiff herein from this defendant, the said Die Deutsche Bank Filiale Nurnberg.

Wherefore, this defendant prays that plaintiff take nothing by his said action and that it be hence dismissed with its costs and disbursements in its behalf sustained.

Morrison, Dumme & Brobeck, Solicitors for said Defendant, Die Deutsche Bank Filiale Nurnberg.

Duly sworn to by Edward Holfeld. Jurat omitted in printing.

[fol. 26] Due service and receipt of a copy of the within answer to amended complaint is hereby admitted this 12th day of June, 1922.

W. H. Hubbard and Humphrey, Grant & Zimdars, Attorneys for Plaintiff. John T. Williams, U. S. Atty.; E. M. Leonard, Asst. U. S. Atty., Attys. for Deft. Thos. W. Miller.

[File endorsement omitted.]

[fol. 27] In United States District Court

[Title omitted]

Memorandum Opinion—Filed March 11, 1924

Rudkin, Circuit Judge:

Owing to the fluctuations and changes in the value of foreign exchange during and following the war, one of the questions involved in this case becomes of the utmost importance and can only be settled authoritatively by the court of last resort. Other questions are not free from difficulty but my conclusions are as follows:

1. That the money deposited by the plaintiff in the names of his minor sons was at all times the money and property of the plaintiff and was at all times recognized by the defendant bank as such, and that the plaintiff is entitled to recover the same with or without assignments from his minor sons.

[fol. 28] 2. That the value of the German mark in American money should be determined as of the time of the breach of duty or the accrual of the cause of action. Page vs. Levenson, 281 Fed. 555; Guinness vs. Miller, 291 Fed. 768; Same vs. Same, Id. 769.

3. That that amount should bear interest from the close of the war at the rate prescribed by the law of the forum. The time of the accrual of the cause of action becomes important for the reason that the value of the German mark must be determined as of that date.

The testimony on the part of the plaintiff as to the different demands made is halting and unsatisfactory, but I am of opinion that a sufficient demand was made under date of June 12, 1915, in view of the reasons assigned for a refusal to comply therewith, and the utter futility of a more definite and positive demand.

A decree will, therefore, be entered in favor of the plaintiff for the balance due, based on the value of the German mark as of the above date with interest at the rate agreed upon by the parties up to the date of our entry into the war, to which will be added interest on the principal sum at the rate prescribed by the laws of this state from the close of the war.

Let a decree be submitted accordingly.

[File endorsement omitted.]

[fol. 29] In United States District Court

[Title omitted]

Judgment—Filed April 8, 1924

This cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof,

It was ordered, adjudged, and decreed as follows:

That the Die Deutsche Bank Filiale Nurnberg (a corporation) is justly indebted to the plaintiff in the sum of Eleven Thousand Four Hundred Forty and 275/100 ($11,440.275) Dollars, with interest thereon from the 24th day of March, 1924, the date of the presentation of this decree; and judgment is hereby given and made in favor of plaintiff against said Die Deutsche Bank Filiale Nurnberg [fol. 30] (a Corporation) for said sum of money, with interest and costs of suit; and

It is further ordered, adjudged, and decreed that plaintiff have and recover the said sum of money from the defendants Thomas W. Miller as Alien Property Custodian of the United States of America and of Frank White as Treasurer of the United States of America, out of and from the sum of Thirty-four Thousand Five Hundred Eight and

13/100 ($34,508.13) Dollars, moneys belonging to said Die Deutsche Bank Filiale Nurnberg (a corporation), and which are now in the possession and under the control of said Miller as such Alien Property Custodian, and Frank White as such Treasurer, as aforesaid.

Dated April 8th, 1924.

Frank H. Rudkin, Judge of said Court.

[File endorsement omitted.]

[fol. 31] In United States District Court

[Title omitted]

Order Extending Term—Filed July 7, 1924

It being shown that the above-styled court rendered its judgment herein on the 8th day of April, 1924, and that thereafter one of the defendants above-named, Die Deutsche Bank Filiale Nurnberg, on the 7th day of May, 1924, filed its Petition herein for a rehearing of said cause by the above-styled court; and

It further appearing that said petition for a rehearing is under submission by said Court, no decision with reference thereto having been rendered:

Now, therefore, it is hereby ordered that the March, 1924, Term of court be and it is hereby extended, for all purposes [fol. 32] of the hearing and determination of said petition for a rehearing, until the actual determination of said petition, and said March Term is hereby extended, for all purposes touching further proceedings in said cause, including any appeal, writ of error or other proceeding that may be instituted for the modification or reversal of the said judgment, and for all purposes of the preparation, serving and filing of a bill of exceptions herein, for the period of thirty (30) days following the rendition of any judgment, order or decree of said court with reference to said petition for a rehearing.

John S. Partridge, Judge.

Dated July 7th, 1924.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION ON ORDER DENYING PETITION FOR REHEARING—Filed October 14, 1924

RUDKIN, Circuit Judge:

The testimony in this case was taken in open court on January 18, 1924; the brief on the part of the plaintiff was filed January 29, 1924; the brief on the part of the defendant on February 27, 1924; the memorandum decision was filed March 1, 1924; the final decree was entered March 24, 1924; and, the petition for a rehearing was filed May 8, 1924. The latter is based upon three grounds:

"The said decree is against law;

"Insufficiency of the evidence to justify the decision and decree;

"Newly discovered evidence, material for this petition, which petitioner could not with reasonable diligence have discovered and produced at the trial."

The first two grounds are but a reargument of the case and I see no reason for disturbing or changing the conclusions heretofore announced. It is, of course, desirable that every case should be fully heard upon its merits, but there must be an end to litigation, and I am constrained to hold that there is an entire absence of any showing of diligence in this matter. The testimony as to a demand was given six weeks before the case was decided and more than two months before the final decree was entered. So far as the record discloses, no attempt whatever was made to verify the claim that a demand had been made until some considerable time after the final decree.

[fol. 34] The principal points urged at the hearing were that there could be no recovery in any event for the moneys deposited in the names of the children, and that the rate of exchange should be fixed as of the date of the decree. If the defendants deemed the claim of a demand material, they should have made application for a continuance or taken some steps to ascertain the facts before final decree. They are not permitted to speculate as to the results and then raise new issue after an adverse decision.

The petition for a rehearing is denied.

[File endorsement omitted.]

[fol. 35] In United States District Court

[Title omitted]

Statement of Evidence—Filed December 9, 1924

Caption

The above-entitled cause came on regularly for trial before the above-entitled court, the Honorable Frank H. Rudkin presiding, on the 18th day of January, 1924, William P. Hubbard, Esq., appearing as counsel for the plaintiff, Honorable Thomas J. Sheridan, Assistant United States Attorney, appearing as counsel for the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and Messrs. Morrison, Dunne & Brobeck, appearing for defendant, Die Deutsche Bank Filiale Nurnberg.

Thereupon, the following testimony and evidence was presented and the following proceedings were had:

Mr. William P. Hubbard thereupon made the following statement in behalf of the plaintiff:

"If your Honor please, we have agreed upon a statement or a stipulation in this case. We offer the stipulation. There will be portions of it which would more properly come from the other side, and portions which would properly come from my side."

Mr. H. A. Judy made the following statement on behalf of the defendant, Die Deutsche Bank Filiale Nurnberg:

"This stipulation purports to cover certain facts deemed by both parties to be material to the issues, and it covers also certain facts claimed by plaintiff or defendant to be [fol. 36] material, or relevant, but not agreed to be material or relevant by the other side."

It was thereupon stipulated between counsel for plaintiff and the defendant Die Deutsche Bank Filiale Nurnberg that the said stipulation should be received in evidence as the joint exhibit of plaintiff and defendant, Die Deutsche Bank Filiale Nurnberg, all objections as to the materiality, relevancy or competency of any of the matters therein stated being reserved to both parties.

Upon such stipulation, the said stipulation was offered and received in evidence as "Joint Exhibit No. 1" of plaintiff and defendant, Die Deutsche Bank Filiale Nurnberg, in words and figures as follows:

JOINT EXHIBIT No. 1

[Title omitted]

[fol. 37] "Stipulation as to Certain Facts

"It is now stipulated and agreed by and between Charles Franklin Humphrey, plaintiff, and Die Deutsche Bank Filiale Nurnberg, one of the defendants in the above-entitled cause, by their respective counsel, that the following are true statements of fact concerning the matters in issue in the above cause, or concerning the matters which are claimed to be in issue therein by some or all of the parties to said action. In making this stipulation each of the parties reserves all objections to the facts stated herein upon the ground of their relevancy and materiality under the pleadings on file herein, and all such questions are reserved for the determination of said court.

"It is further stipulated that this stipulation may be introduced in evidence in proof of the facts in issue, all of said objections on account of relevancy or materiality to be urged at the time that this stipulation is sought to be introduced in evidence.

"The following are agreed to be true statements of fact:

I

"The allegations of paragraph I of the amended complaint on file herein, and each of them, are true.

[fol. 38] II

"Annexed hereto, marked Exhibit 1, is a correct translation from the German into the English language of a transcript of the books of account of said defendant, Die Deutsche Bank Filiale Nurnberg, showing the amounts, dates, sources and nature of deposits and withdrawals made by the plaintiff or in his behalf in the account with said defendant of C. F. Humphrey and Elizabeth Humphrey, his wife.

III

"Annexed hereto, marked Exhibit 2, is a true translation from the German into the English language of a transcript from the books of account of said defendant, Die Deutsche Bank Filiale Nurnberg, showing accurately the amounts, dates, sources and nature of deposits and withdrawals made by or on behalf of the persons named in said transcript, or by or on behalf of the plaintiff herein, Charles Franklin Humphrey, in the account with said Die Deutsche Bank Filiale Nurnberg standing in the names of James Warren Humphrey and John Charles Humphrey.

IV

"The deposits, withdrawals and changes shown on said transcripts marked Exhibits 1 and 2, respectively, were actually made as represented and shown in said transcripts.

V

"All of the sums deposited in either of the accounts mentioned in the preceding paragraphs II and III were made by Charles Franklin Humphrey, the plaintiff herein, from moneys which, prior to the time of such deposit or deposists, [fol. 39] were the sole property of plaintiff or of plaintiff and his said wife, Elizabeth Humphrey.

VI

"There have been no changes in the state of the accounts referred to in the preceding paragraphs of this stipulation since the last dates shown on said transcripts. No payments have been made by said Die Deutsche Bank Filiale Nurnberg to plaintiff or to plaintiff's order, or on behalf of the persons designated in said accounts, other than as represented upon said transcripts. The balances shown upon said transcripts as of the 30th of June, 1917, include all interest upon the sums designated in said transcripts to and including the 6th of April, 1917.

VII

"The facts concerning the deposits, withdrawals, interest credits, rate or rates of interest and the demand or demands for payment shown or not shown by said tran-

scripts referred to in the preceding paragraphs of this stipulation may be supplemented by any competent evidence that may be adduced upon the trial of this cause.

VIII

"On the 30th day of June, 1917, the balances remaining on deposit with said Die Deutsche Bank Filiale Nurnberg to the said account of Charles Franklin Humphrey and Elizabeth Humphrey, and to the account of James Warren Humphrey and John Charles Humphrey, were paid by said Die Deutsche Bank Filiale Nurnberg, by compulsion of the Imperial German Government, to the German Custodian [fol. 40] for the property of alien enemies, and no part thereof has ever been repaid to said defendant. Such payment by said defendant was without the knowledge or consent of the plaintiff herein or the persons in whose names said accounts stood upon the books of said defendant.

IX

"Prior to the 16th day of October, 1919, the Alien Property Custodian of the United States Government seized in the United States, moneys or credits purporting to be the property of said defendant, Die Deutsche Bank Filiale Nurnberg, in the aggregate sum of Thirty-four Thousand Five Hundred Eight and 13/100 Dollars ($34,508.13), and prior to said 16th day of October, 1919, all of said sum was paid by said Alien Property Custodian to the Treasurer of the United States of America. All of said sum of Thirty-four Thousand Five Hundred eight and 13/100 Dollars ($34,508.13) has at all times since said 16th day of October, 1919 and on said day, remained in the possession of said Alien Property Custodian or said Treasurer of the United States, or their successors in office.

X

"On or about the 15th day of October, 1918, Charles Franklin Humphrey, plaintiff herein, filed with the Alien Property Custodian of the United States, his notice of claim, under oath, and in such form and containing such particulars as were and are required by the 'Trading with the Enemy Act,' a statute of the United States of America, [fol. 41] in and by which claim said plaintiff claimed the

payment, from funds in the hands of said Alien Property Custodian or said Treasurer of the United States, of the sums deposited with Die Deutsche Bank Filiale Nurnberg by plaintiff. Subsequently, and on or about the 24th day of January, 1920, plaintiff made application to the President of the United States of America for the allowance of the claim referred to in this paragraph, but no action was then or thereafter taken upon said application by said President of the United States.

XI

Said Die Deutsche Bank Filiale Nurnberg has never consented and does not now consent to the payment of the claim referred to in the preceding paragraph of this stipulation from the moneys in the possession of said Alien Property Custodian or the Treasurer of the United States, as hereinabove stipulated, though request has been made to said Die Deutsche — Filiale Nurnberg by plaintiff for such consent.

XII

"That on the 6th day of April, 1917, the Congress of the United States of America declared war against Germany, and a state of war thereupon and thereafter until the 2d day of July, 1921, existed between the said United States of America and said Germany.

XIII

"That between the 6th day of April, 1917, and the said 2d day of July, 1921, said Die Deutsche Bank Filiale Nurnberg was an alien enemy as defined by said 'Trading with [fol. 42] the Enemy Act' enacted October 16, 1917, and the acts amendatory thereof and supplemental thereto.

XIV

"That German marks are, and at all times in this stipulation and in the amended complaint on file herein referred to, were, lawful money of the German Empire and of the German Government succeeding to such Empire. That at all times in this stipulation referred to dollars were and they now are lawful money of the United States of America. That at all times in this paragraph referred to the par of exchange, namely, the rate at which gold marks of Germany

were and are convertible into gold dollars of the United States was and is .2382 of a gold dollar for each gold mark. At all times in this paragraph referred to the current rate of exchange for the conversion of marks, lawful money of Germany, into dollars, lawful money of the United States of America (not taking into account the expense of transmitting funds from Germany to the United States) was as hereinafter indicated: On June 12, 1915, four German marks, lawful money of Germany, were convertible into .82½ of an American dollar, lawful money of the United States; on July 29, 1914, four German marks, lawful money of Germany, were convertible into .97 of an American dollar, lawful money of the United States of America; on the 17th day of August, 1914, four German marks, lawful money of Germany, were convertible into .95½ of an American dollar, lawful money of the United States of America; on March [fol. 43] 29, 1917, and thereafter until April 6, 1917, and prior to the declaration of war between the United States of America and Germany, four marks, lawful money of Germany, were convertible into .69-7/16 of an American dollar, lawful money of the United States of America. From the declaration of war between the United States of America and Germany on April 6, 1917, until the 18th day of August, 1919, all communication between plaintiff and said defendant bank, as well as the transmittal of any funds from Germany to the United States of America, and also the payment of any funds by said defendant bank to the plaintiff herein, each and all was and were prohibited by the laws of the United States of America and also by the laws of Germany; and from and after said first mentioned date until the end of said war on the second day of July, 1921, the rate at which marks, lawful money of Germany, were from time to time converted into dollars, lawful money of the United States of America, was as will be shown in the statements to be supplied to this Court by Mr. Simpson, Manager of the Foreign Department of the Crocker National Bank of San Francisco, as hereinafter provided. Upon the termination of said war on the said 2d day of July, 1921, and thereafter at all times until the commencement of this action, and at the present time, the expense of transmitting the plaintiff's demand in German marks, lawful money of Germany, to the United States of America, would have exceeded and now exceeds the sum of one dollar.

[fol. 44] XV

"Annexed hereto and marked Exhibits 3 to 14, both inclusive, are true copies of letters addressed and mailed or delivered by the person or persons signing the same to the persons appearing therein as the addressee. All of such letters were, within a reasonable time after the date shown thereon, actually received by the addressee or addressees, at the address indicated thereon, or if no address is thereon indicated at the Banking House of said Die Deutsche Bank Filiale Nurnberg, if said bank is the addressee, or at San Francisco, California, if such addressee is in any of said cases Charles Franklin Humphrey, said plaintiff.

XVI

"It is further stipulated that there may be furnished to this court a statement or statements made in writing by Mr. Simpson, Manager of the Foreign Department of The Crocker National Bank of San Francisco, concerning the current rate or rates of exchange for the conversion of marks, lawful money of Germany, into dollars, lawful money of the United States of America, at any dates between the 1st of January, 1914, and the time of the commencement of this action, which may be procurable by him, and that such statement or statements so furnished as aforesaid shall be taken and considered by the court as facts herein, as fully and to the same effect as if incorporated in this stipulation and offered and received in evidence upon the trial of this cause. Such statement or statements shall [fol. 45] be furnished to said court prior to the final submission of this cause.

"Dated January 18, 1924.

"Wm. P. Hubbard, Humphrey, Grant, Zimdars & Warren, Attorneys for Plaintiff. Morrison, Dunne & Brobeck, Attorneys for Defendant Die Deutsche Bank Filiale Nurnberg.

"The foregoing stipulation is hereby joined in by the Alien Property Custodian and the Treasurer of the United States, two of the defendants in the above action.

"—— ——, Attorneys for Defendants Thomas W. Miller and Frank White."

(Here follow Exhibits Nos. 1 and 2, marked side folio pages 46, 47, 48, 49, and 50)

[fol. 46]

"Exhibit 1

"Transcript

Mr. C. F. Humphrey and Mrs. Elizabeth in Account with the German Bank and Its Branch in Nurnberg

"Credit (Payments to C. F. Humphrey and Mrs. Elizabeth)

		Date of entry	Receipts	Total
1914.				
June 30.	By Balance forward	June 30.	Marks,	10 50
1914.				
July 13.	By cash payment	July 13.	Marks,	10 50
Nov. 14.	Drawn from Munchen Branch	Nov. 14.		1,200 —
	By Commission	14.		1 80
Dec. 31.	" Postage	Dec. 31.		20
	" Balance	31.		530 45
			Marks,	1,742 95
1915.				
June 18.	By Postage	June 18.	Marks,	1 20
30.	By Coupons paid	Same day.		718 06
	" Postage and charges			2 54
	" Balance			22,440 25
			Marks,	23,162 05
1915.				
Dec. 31.	For Postage and charges	Dec. 31.	Marks,	21
	Balance	31.		23,332 70
	Carried forward		Marks,	23,332 91
[fol. 47]	Brought forward		Marks,	23,332 91
				23,332 91
1916.				
June 30.	For postage and charges	June 30.	Marks,	40
	Balance	30.		23,507 30
			Marks,	23,507 70
Dec. 31.	For postage and charges	Dec. 31.	Marks,	40
	Balance	31.		23,683 20
				23,683 60
1917.				
June 30.	By payment to the German Custodian of the property of enemy aliens		Marks,	23,860 80
			Marks,	23,860 80

Debit (Amounts Paid by C. F. and Elizabeth Humphrey)

1914.				
Jan. 7.	Transmitted from main office	Jan. 5.	Marks,	10 50
July 1.	By balance carried forward	June 30.	Marks,	10 50
Nov. 14.	Taken over from the deposit to the credit of James Warren and John Charles Humphrey	Nov. 14.		1,201 80
23.	By cash payment	Dec. 15.		530 —
Dec. 31.	3% interest credited			65
			Marks,	1,742 95
1915.				
Jan. 6.	By collection of securities	Jan. 4.	Marks,	19,980 —
1.	Balance forward	Dec. 31.		530 45
June 16.	Transmittal from German Bank, Berlin	June 14.		237 90
22.	Coupons cashed	22.		1,494 19
	" "	July 15.	For'd,	255 56
	" "	Aug. 1.	"	225 —
	" "	Oct. 1.	"	125 —
	" "	Nov. 1.	"	112 50
30.	2% interest credited	June 30.		201 45
			Marks,	23,162 05
July 1.	By balance forward	June 30.	Marks,	23,440 25
	Coupons—forward	July 15.		255 56
	" "	Aug. 1.		225 00
	" "	Oct. 1.		125 —
	Carried forward		Marks,	23,045 81
1915.				
July 1.	Brought forward		Marks,	23,045 81
1.	Coupons—forward	Nov. 1.		112 50
Dec. 31.	Interest 2% and 1½%			174 60
			Marks,	23,332 91
1916.				
Jan. 1.	By Balance forward	Dec. 31.	Marks,	23,332 70
June 31.	Interest 1½%			175 —
			Marks,	23,507 70
July 1.	By balance forward	June 30.	Marks,	23,507 30
Dec. 31.	Interest 1½%			176 30
			Marks,	23,683 60
1917.				
Jan. 1.	By balance forward		Marks,	23,683 20
June 30.	Interest 1½%	Dec. 31.		177 60
			Marks,	23,860 80"

CHART

TOO

LARGE

FOR

FILMING

[fol. 51] "EXHIBIT No. 3

"Abschrift

"Nurnberg, Dec. 20th, 1913.

"Deutsche Bank Filiale, Nurnberg.

"GENTLEMEN: I herewith hand you twenty (20) Treasury Certificates of one thousand marks each, the same being Hungarian Four and one-half per cent Treasury Certificates, Series 1, falling due on July 1st, 1914, numbered S. Z. No. 13071—to 13090, inclusive.

"Please hold them for the account of James Warren Humphrey and John Charles Humphrey subject only to my order. In the event of my death Elizabeth Warren Humphrey shall have the right as guardian of James Warren Humphrey and John Charles Humphrey to withdraw said bonds or the money received therefor.

"When these bonds are due please collect them, unless otherwise directed by me and place the money on interest for said James Warren Humphrey and John Charles Humphrey at your best rate of interest for three months. These funds are only drawable by me but in case of my death then by Elizabeth Warren Humphrey as above described.

"Respectfully your-, (Sg.) C. F. Humphrey."

[fol. 52] "EXHIBIT No. 4

"Abschrift

"Corseaux sur Vevey, Schweiz, Nov. 11th, 1914.

"An die Deutsche Bank Filiale Nurnberg:

"Will you please telegraph to your bank in Munchen to pay to Mary Chapman, living at Widenmeyerstrasse, I think the number is 45 the sum of twelve hundred Marks (1,200)—and charge it against the 18,000 Mark account I am anxious to have this reach Miss Chapman as soon as possible so thank you for the prompt attention I know this will have at your hands.

"Very truly yours, (Sg.) C. F. Humphrey."

"Exhibit No. 5

"Translation

"Letter by Deutsche Bank to Humphrey Dated November 14, 1914

"We are in possession of your favor of the 11th of this month and have, in accordance with your instructions, advised our Munich Branch by wire to pay to Mrs. Mary Chapman, Munich, Widenmeyerstrasse for

your account ..... Marks 1,200,
for which we, in addition to ..... " 1.80,

charge you with ..... Marks 1,201.80

"(Signed) Deutsche Bank."

[fol. 53] "Exhibit No. 6

"Abschrift

"Calle de Lagasca, Madrid, Spain, January 11th, 1915.

"Dear Sir: Will you please send to Deutsche Ueberseeische Bank Wilhelmstrasse 71 Berlin W. 8 your associated concern (?) the interest for the last three months on the 41,000 deposit and the interest on the other account. Also send to the same bank the money collected on the Coupons left with you.

"Having left these funds with you so long I trust you will allow the best possible rate of interest.

"Kindly advise us of the collection of the Hungaria Bonds due January 1st, 1915.

"Note the new address. Calle de Lagasca 109 Madrid.

"With best wishes I am

"Respectfully yours, (Sg.) C. F. Humphrey."

"Exhibit No. 7

"Translation

"Letter by Deutsche Bank to Humphrey Dated February 3rd, 1915

"We received your favor of January 11th of this year and transmit to you enclosed the statement of interest of your deposit account for your information.

[fol. 54] "As requested by you we transferred the amount of Marks 487.50 to the Deutsche Ueberseeische Bank in Berlin in charging you with this amount on your deposit account.

"We enclose acknowledgment concerning the 4½% Hungarian Treasury certificates for Marks 20,000 fallen due on January 1, this year and of three letters addressed to you that have reached us and sign

"Deutsche Bank."

"Exhibit No. 8

"Translation

"Letter by Deutsche Bank to Humphrey dated February 4th, 1915

"Confirming our yesterday's letter we inform you that we pay interest on your credit balance of the deposit account since January 1, until further notice at the rate of 2% per annum prevailing in the market for daily money at present.

"We add that at the present time and until further notice we pay interest for deposit moneys.

"Upon one month's notice at the rate of 3 %.
" three " " " " " 3¼%.
" six " " " " " 3½%.

"If you desire to leave your deposit balance with us for some time please inform us.

"(Signed) Deutsche Bank."

[fol. 55] "EXHIBIT No. 9

"Translation

"Copy

Nuremberg, June 12, 1915.

"Mr. C. F. Humphrey, p. Adr. Madame Oulevay, Corseaux s/Vevey:

"Deposit Account James Warren Humphrey and John Charles Humphrey

"We received to-day from the Comptoir d'Escompte de Geneva, the deposit certificate of our bank No. 4806 for Marks 41,000, which we have redeemed.

"'We have therefore debited the above deposit account with

"Marks 41,000.—Value 12th of this month against this deposit certificate and shall render interest statement together with the semi-annual statement as per June 30th.

"Yours very truly, Deutsche Bank Filiale Nurnberg.
(Signed) Hoppe, ppa, Buehler."

[fol. 56] "EXHIBIT No. 10

"January 26, 1916.

"Deutsche Bank, Filialle, Nurnberg, Germany.

"GENTLEMEN: I herewith enclose you coupons as follows:

"1 dividendennschein 28 Zui Aktie—168580-1-2.

"5 allgemeine Electrictate Gesellschaft Numbers 084403 to 084407 inclusive, Uber 1,000 mark each.

"8-4% Deutschen Reiche Von 1912 numbers 194996-190499/60/61-189884 to 189887 inclusive.

"Will you kindly place the same to my credit?

"Kindly send me a statement of my account and let me know what rate of interest you are paying me at present. Also your rate of interest for three months call and six months call.

"Please send the letter to N. W. Halsey & Co., Rue Croix d'Or, Geneva, who will forward same to me.

"Yours very truly, —— ——. CFH:MM.

"Exhibit No. 11

"Deutsche Bank Filiale, Nurranburg, Germany:

"The terrible war is now at an end and the Alien Property Custodian in his letter to me under date of August 18, 1919, says:

[fol. 57] "'Direct communication with the enemy with a view to procuring from him such assent is now facilitated by reason of the fact that it is no longer necessary to obtain license from the War Trade Board to do so unless the enemy be in Hungary or Soviet Russia.'

"Will you, therefore, kindly send me a statement of my account and the account of Mrs. C. F. Humphrey with your bank showing computation of interest.

"Will you also give your assent to my drawing the money from funds belonging to you and on hand with the Alien Property Custodian in this Country at the rate of exchange adopted by the Alien Property Custodian for payment of American claims.

"Very truly yours, C. F. Humphrey."

"Exhibit No. 12

"Deutsche Bank, Grundvermogen and Rucklagen, Filiale Nurnberg

"505 Millionen Mark

"Nurnberg, den 6 December, 1919.

"Herrn C. F. Humphrey, San Francisco Merchants National Bank Building:

"We have your letter of Oct. 18 and enclose herewith desired statements to June 30, 1917, when your property was given to the German Custodian of property of alien enemies.

[fol. 58] "Regarding the closing sentence of your letter we cannot give you any information as the German and American Regulations have not yet been agreed upon.

"Deutsche Bank Filiale Nurnberg."

"EXHIBIT No. 13

"Deutsche Bank Filiale Nurnberg

"Deutsche Bank, etc.

"Nurnberg I, 13th June, 1914.

"Brieffach

"Mrs. E. W. Humphrey, Corseaux s/Vevey.

"MADAM: We are in receipt of your esteemed letter of the 14th inst. enclosing declaration relating to American Coupons, with which we have done the needful. We shall refer to the matter later on should the declaration not be in order.

"Referring to your remarks re Mks. 358.75 (interest on M. 41,000—from 31st Dec., 1913, to 10th March, 1914), we beg to say that we first credited you with this amount under date of 11th May, debiting you at the same time for Mks. 358.75, the equivalent of which, viz. Frs. 439—we remitted to the Banque Cantonale, Vevey for your account; this matter is therefore settled.

"We have up till now not received any communication [fol. 59] from your husband regarding your deposit of Mks. 41,000—which have been due on 10th March last.

"Besides this deposit of Mks. 41,000—there are Mks. 1,042.50 in your favour with us, as mentioned by you.

"Please note that we are granting interest at the rate of 2% p. a. on daily money at this time.

"Yours respectfully, Deutsche Bank Filiale Nurnberg."

EXHIBIT No. 14

"August 5th, 1915.

"Deutsche Bank Filiale, Nurnberg, Germany.

"GENTLEMEN: I herewith enclose copy of a letter I have this day sent to the Deutsche Bank, Berlin, which is self-explanatory.

"You will kindly pay the Deutsche Ubereens Bank the cost of insuring and sending these coupons to you in Berlin.

"The Deutsche Society are having a big time here at the exposition to-day and my boys are out there. We expect to go out there this evening as it is to be one of the great fetes. Let us hope the war will soon be over so that we may enjoy each other's country and company. With kindest regards and pleasant memories of Nuremberg, I beg to remain,

"Sincerely yours, (Sig.) C. F. Humphrey."

[fol. 60] "P. S.—I have not as yet had any acknowledgment from you for something like 2,000 Marks Shares of Coupons sent you from Aigle, June 17th. They were insured for 2,200 francs. I have also not had an acknowledgement for my letter to you in regard to contemplated loans to be made through Mr. Otto Weber. It may be that my mail has been stopped in France, although I was sending it through a bank in Switzerland. However it seems I am on the black list, and some of my mail has been held in France. I know no reason for it either, except that I have funds in Germany. If you will answer me and send the letter to Mme. Oulsvay, Corseaux-Sur-Vevey and ask her to forward the letter to me I can get it in that way.

TESTIMONY OF CHARLES FRANKLIN HUMPHREY IN HIS OWN BEHALF

The witness, after being duly sworn, testified:

"I am the plaintiff in this action, and during a part of the times mentioned in this complaint I was in Germany."

There was then shown to the witness a letter and a statement in the German language. The witness further testified:

"I have seen that statement before. I received it in Madrid some time in the forepart of February, 1915. The letter shown to me accompanied it. The statement purports to be the statement of defendant bank of all the moneys then on deposit with said bank, whether standing [fol. 61] upon the books of the bank in my own name, or standing upon the books of said bank in the names of my children."

"The Court: What is the purpose of this testimony?

Mr. Hubbard: It is to supplement the statement. The statement was not entirely as clear as we thought it might have been.

The Court: Is there any dispute over the amount in the bank?

Mr. Judy: Not as to the amount in the bank, but there is as to the amount the plaintiff is entitled to recover. Mr. Humphrey sues for some 78,000 Marks, alleging that prior to a certain date in 1914 he deposited marks in bank payable to himself and wife which aggregated, on a day in 1914, the sum of M. 78,000. In proof of that, he seeks to show that there were two accounts, two deposit accounts with the bank, one standing in the name of himself and his wife, and one standing in the name of his two sons. With regard to the account standing in the name of Mr. Humphrey and his wife we have no objection, we think that comes within the complaint, and the issues made by the pleadings, which purport to be a claim on behalf of moneys deposited to the order of Mr. Humphrey, or Mr. Humphrey's wife, but as to the deposits made in the name of the sons, we say that without some showing of assignment, or without some showing of guardianship, Mr. [fol. 62] Humphrey has no standing to recover the moneys standing in the names of the sons.

The Court: Are they minors?

Mr. Judy: They were at the time.

Mr. Hubbard: Mr. Humphrey will explain the statement of that account, and also showing when he put that money in the bank and how it was to be handled. This statement that I have just presented to your Honor shows how the German Bank in one summarized statement treated all three accounts, and treated them as belonging to C. F. Humphrey.

The Court: Of course, if judgment goes here for the plaintiff, the Government is entitled to have a judgment that would be binding on the sons. They are minors, you say?

Mr. Hubbard: They are minors. They were minors; one is now a minor and one is of age. Any assignment that is necessary can be obtained.

The Court:

Q. One was a minor at the time suit was brought?

A. Both were minors at the time.

The Court: I think an assignment filed of record would cover that. I think the father would be entitled, by reason of his relationship, to recover the deposit for his minors, wouldn't he, during minority?

Mr. Judy: With deference, I should think not without guardianship proceedings.

Mr. Hubbard: We have here, your Honor, not only, as I say, that statement which we have just referred to show-[fol. 63] ing that the German Bank treated it as Mr. Humphrey's money and handled it as such upon their own books, but, aside from that, the statement from the German Bank as at the time that Mr. Humphrey put the money in it. It was put there in that way for school purposes for the children.

The Court: Whose name was it in?

Mr. Hubbard: It was in the name of those two children, but subject only to Humphrey's order and the order of the schoolmaster; the children never drew on it.

The Court:

Q. What does that amount to?

A. The balance is 41,000 Marks.

Mr. Judy:

Q. It is about 19,000 Marks on account of the sons, isn't it?

A. 18,000 odd to the sons and 23,000 to the account of Mrs. Humphrey and myself.

Mr. Hubbard: We have this statement with that letter.

Mr. Judy: We object to the admission of the letter and the statement in evidence in so far as either the letter or the statement has to do with any account in the Deutsche Bank standing in the names of any persons other than the plaintiff, C. F. Humphrey, or the plaintiff and his wife, Elizabeth, on the ground that except as to such accounts the letter and the statement would be irrelevant and not within the issues of the case.

Mr. Hubbard: In support of it we contend that it is, as I have said, a detail summarization of all the money that is [fol. 64] in dispute here that includes in the name of Humphrey himself and that which was so deposited in the names of these children kept according to this statement in

the German bank as one account, showing the amount of M. 78,308.65, the amount that we sue for; and that, accompanied by the letter which accompanied the statement when sent to Mr. Humphrey, shows, as I say, that the German Bank treated them all as Mr. Humphrey's money, and under his sole control.

The Witness: Here is the children's account. Here is a letter advising me that I have on this date M. 58,258 to my account. That is the children's account and my account together.

The Court: I will admit it. The legal question will come up afterwards."

"Mr. Hubbard: We will undertake to obtain from the children a release or a satisfaction.

The Court: I am not holding that as a matter of law, I am just suggesting it.

Mr. Hubbard: We will supply that from these two boys.

The Court: Any statement you furnish from the bank would have no binding effect.

Mr. Judy: And, furthermore, I think there is a very important question as to whether the rights of the children are asserted in the filing of this complaint; in other words, if they had rights then and Mr. Humphrey was the only one who filed a complaint and asserted a cause of action, [fol. 65] the children's rights must be appropriately asserted by Mr. Humphrey as their guardian ad litem.

The Court: I am not certain that a parent is compelled to be appointed a guardian ad litem in order to collect money belonging to his sons, because he is entitled to it by reason of his relationship.

"Mr. Judy: We will cover that in the briefs, your Honor."

Thereupon said letter and statement were offered and received in evidence as Plaintiff's Exhibit No. 2. The letter was in words and figures as follows:

"Plaintiff's Exhibit No. 2 to Testimony of Charles Franklin Humphrey

"Nuerenberg, February 3, 1915.

"Mr. Ch. F. Humphrey, Now at Madrid, Calle de Lagasca 100:

"We received your letter of January 11 of this year and enclose herewith the statement of interest of your deposit for your use.

"In accordance with your wishes we transfer the amount of M. 487.50 to the 'Deutsche Ueberseeische Bank' in Berlin, and debit your deposit with it.

"We add the statement showing that the M. 20,000.— 4½% 'Ungar. Staatskassenscheine,' which became due on January 1, have been accredite-, also three letters, which arrived for you, and sign

"Yours very truly, German Bank Branch Nuerenberg. (Signature illegible.)"

[fol. 66] The statement was addressed to plaintiff and signed by the defendant bank, and covered the items of the two accounts referred to in the foregoing joint stipulation No. 1. The statement showed the aggregate of the balances in both said accounts, as of February 3, 1915.

The witness further testified: In opening the account with defendant bank standing in the names of my sons, James Warren and John Charles Humphrey, I surrendered a deposit certificate for 41,000 Marks. That was my money. I instructed the bank to open a new account in the name of my children and we left an authorization with the head master of the school where my children were in school so that he could have drawn the moneys from that. I have here my Lloyd's bank check-book and my International Bank check-book, both of London, showing where I took these moneys from London accounts. They were all my moneys.

"Mr. Hubbard:

Q. Did you ever make any demand on this German bank for the payment to you of the sums represented in these several accounts?

A. I did. I would like to go ahead and explain.

Q. Just when did you make the demand?

A. In the first week in August, 1914, and along in November, 1914, and in June, 1915—along about the 12th of June.

Q. About the 12th of June, 1915, you made a demand?

A. Yes, sir.

Q. Did you receive the moneys?

[fol. 67] A. No, not all of them.

Q. What was stated to you by the bank?

A. The bank stated to me that on the 5th there was a moratorium, and that I could have the usual amounts that I had been accustomed to use, but——

Q. On the 5th of what?

A. On the 5th day of August, 1914.

Q. But they did not pay you and would not pay you the total sums represented by these accounts?

A. They did not.

Q. You demanded the whole thing on that date?

A. Yes, I wanted to take all of it out. Then, again, on the 5th——

The Court: That is enough.

A. (Continuing:) There were moneys deposited after that.

Mr. Hubbard:

Q. They were insignificant in amount, though, were they not?

A. No. I cashed Hungarian bonds, M. 20,000, becoming due the 1st of January; the bonds were in the bank, they cashed them at that time and advised me of that fact.

Q. Did you make a demand after that?

A. Yes, I went up there in June, 1915.

Q. You testified to that, June 12, 1915.

A. Around in June, 1915.

Q. You spoke of a subsequent deposit after that?

A. The deposits after that were simply coupons on German bonds that I had with the Deutsche Bank, or dividends on Deutsche Bank shares.

[fol. 68] Q. Did you make any demand after your deposit of these subsequent coupons?

A. In 1919 I asked the German Bank to consent that I draw the moneys which had been taken over, draw my account against the moneys which had been taken over by the Alien Property Custodian in this country.

Mr. Hubbard: That is all.

Cross-examination.

Mr. Judy:

Q. Mr. Humphrey, you have testified that you made a demand on the German Bank in Nuerenberg, Germany, during the first week of August, 1914, for the payment of the entire balance of your account there?

A. Yes. I wanted to get the entire account transferred.

Q. Upon whom did you make that demand?

A. I think Mr. Hirsch was the name of the man; he was the man I generally did business with.

Q. Was he an officer of the bank?

A. Yes, he was one of the directors. I went to his office.

The Court:

Q. He was a person who paid out money?

A. No, he was the man in charge of the bank.

Q. That is what I mean.

A. Yes, sir.

Mr. Judy:

Q. Was there anybody else present at the conversation you had at that time, other than yourself and Mr. Hirsh?

A. I could not tell you, I don't recall it.

Q. Can you state the substance of the conversation that [fol. 69] was then had between yourself and Mr. Hirsch?

A. I am not positive about what took place. I can tell you different things that took place in our conversation that impressed themselves upon me, but I cannot tell you the conversation that took place.

Q. I am referring to the conversation had in the first week of August, 1914.

A. No, I could not say the different things, I could not say just what took place.

Q. You cannot recall any portions of those conversations?

A. I can tell you portions of the conversation, things that impressed themselves upon my mind but I cannot say that it took place in the August conversation, or the November conversation, or the June conversation. There were certain things that impressed me very much, and I do remember them.

Q. Due to the fact that when you made your first demand in the first week of August, 1914, that was shortly after the declaration of war between Germany, France and England?

A. Yes.

Q. I thought perhaps there would be some matters that occurred in that conversation that you could recall.

A. Yes, I do, come to speak of it now. I could not get any gold. They looked at my account and saw I was getting about so much, or asked me how much I had used, and also told me that I should not take any securities from Ger- [fol. 70] many. I remember that I could not get any gold.

Q. You deposited certain German securities or Hungarian securities with the defendant bank following this demand made in the first week of August, 1914, for collection by that bank, did you not?

A. I think they were in one of the branch banks. In 1913 I bought from the Deutsche Bank in Nuerenberg, on May 24——

The Court: Don't go into all these details. Were these bonds in the bank at the time, or did you deposit them afterwards?

A. I think they were in the bank at the time.

Q. You said you made subsequent deposits; that is the reason I wanted to know.

A. Yes, sir. These bonds were left in the bank for collection when they would become due.

Mr. Judy:

Q. Did you in the first week in August, 1914, attempt to draw these particular bonds from the bank?

A. I don't recall that.

The witness further testified: I have heretofore made claims to the Secretary of State of the United States for the payment, through the agency of the Mixed Claims Com-

mission, of the claims which are here in suit. Such claims were made in part in my name and in part in my sons' names. I recognize, as copies of such claims, the documents now presented to me.

Said claims were thereupon offered and received in evidence as Defendant's Exhibit "A" and as Defendant's Ex-[fol. 71] hibit "B," respectively, and were in words and figures as follows:

DEFENDANT'S EXHIBIT "A" TO TESTIMONY OF CHARLES FRANKLIN HUMPHREY

"Claim of James Warren Humphrey and John Charles Humphrey v. Die Deutsche Bank Filiale, Nurnberg, Germany

"To the Secretary of State, United States of America, Washington, D. C.:

"The petition of James Warren Humphrey and John Charles Humphrey respectfully represents as follows:

"That they are native-born citizens of the United States of America, and are now and at all of the times herein mentioned were citizens of the State of California, and are now and at all of the times herein mentioned have been residents and domiciled in the State of California, except on visits abroad during portions of the years 1907 to 1915. That petitioners' present address is 625 Market Street, San Francisco, California.

"That the Die Deutsche Bank Filiale of Nurnberg, Germany, was during the year 1911 and for a long time prior thereto, and ever since has been and now is a banking corporation, located and having its principal place of business in Berlin, and a branch in Nurnberg, Germany, and is organized and doing business in Germany under and by virtue of the laws of Germany, and as petitioners are informed and believe and so allege the fact to be, the stockholders [fol. 72] are mainly composed of individuals who are now and at all of the times herein mentioned were citizens of Germany and residents therein.

"That between and prior to November 24, 1914, and previous to April 6, 1917, there had been deposited to petitioners' accounts and credit with Die Deutsche Bank Filiale of Nurnberg, sums which aggregated on or before said 6th day of April, 1917, the sum of 18,036.80 German marks.

"That said sums were so deposited at said times in said bank to the order of petitioners and subject to their check, and the check of their then guardian, Charles Franklin Humphrey, and your petitioners are now the sole owners of said fund and the whole thereof, and that the whole of said fund is now due, owing and unpaid from said Bank to petitioners, and has been so ever since and before said 6th day of April, 1917.

"That an account was rendered by said Die Detusche Bank Filiale of Nurnberg, Germany, of said funds on the 4th day of December, 1919, a photographic copy of which is hereto attached and marked 'Exhibit 1,' and that the balance showing under said acocunt has not been paid, and is still owing from said Bank to petitioners.

"That the affidavit of Charles Franklin Humphrey, father of petitioners, as to the places of birth of petitioners is hereto attached and marked "Exhibit 2."

"That the said moneys were payable on demand and were so on deposit and owing by said Bank on said 6th day of [fol. 73] April, 1917, on which day, because of the acts of the German Government against the United States and its citizens, the Congress of the United States declared war against Germany, and that at the time of said declaration of war the German mark was worth 18½¢ lawful money of the United States of America, and that because of acts of the Government of Germany making the said declaration of war necessary, and of the act of the Congress of the United States of America thereupon on October 16, 1917, and known as 'Trading with the Eenemy Act,' and acts amendatory thereof and supplementary thereto and because of the refusal of the government of Germany to permit the withdrawal of said funds, it has been impossible for petitioners to obtain payment of said funds and accounts ever since said 6th day of April, 1917, and prior thereto, until the termination of the war.

"Wherefore, petitioners pray that they be granted payment of the said account hereinbefore set forth, in lawful

money of the United States of America, at the rate of 18½¢ for every mark of German money so owing to them as aforesaid.

(Signed) James Warren Humphrey. (Signed) John Charles Humphrey.

"Charles Franklin Humphrey hereby certifies that he is the father of petitioners and was their guardian at the time of the deposit of the said funds, and still is the guardian of the minor son, and he hereby joins in the foregoing petition.

"____ ____.

[fol. 74] "UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

"James Warren Humphrey, John Charles Humphrey and Charles Franklin Humphrey, being first duly sworn, each for himself and not one for the other deposes and says:

"That he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true.

"(Signed) James Warren Humphrey. (Signed) John Charles Humphrey. (Signed) Charles Franklin Humphrey.

Subscribed and sworn to before me this 23d day of December, 1922. (Signed) Charles R. Holton, Notary Public in and for the City and County of San Francisco, State of California." (Seal.)

EXHIBIT NO. 2 TO TESTIMONY OF CHARLES FRANKLIN HUMPHERY

"United States of America,
State of California,
City and County of San Francisco, ss:

"Charles Franklin Humphrey, being first duly sworn, deposes and says:

"That he is the father of James Warren Humphrey and [fol. 75] John Charles Humphrey, the petitioners named in the foregoing petition:

"That James Warren Humphrey was born in the city and county of San Francisco, State of California, United States of America on the 26th day of October, 1901, and that John Charles Humphrey was born in the city and county of San Francisco, State of California, United States of America, on the 26th day of June, 1914.

(Signed) C. F. Humphrey.

Subscribed and sworn to before me this 23d day of December, 1922. (Signed) Charles R. Holton, Notary Public in and for the City and County of San Francisco, State of California." (Seal.)

DEFENDANTS' EXHIBIT "B" TO TESTIMONY OF CHARLES FRANKLIN HUMPHREY

A summary of the contents of said exhibit is as follows:

This exhibit was the petition of Charles Franklin Humphrey, dated December 23, 1922, addressed to the Secretary of State of the United States of America, by which petitioner claimed that, prior to November 24, 1914, he had deposited with Die Deutsche Bank Filiale Nurnberg sums of money which, on the 6th day of June, 1915, aggregated the sum of 19,980 marks and that he had thereafter deposited other sums which, after deduction of all charges and expenses, brought the amount on deposit with said bank in favor of petitioner on the 6th day of April, 1917, [fol. 76] to the sum of 23,683.20 marks. By said petition, the said Humphrey further claimed that he was entitled to the payment of said account in lawful money of the United States at the rate of 18½ cents (the value of marks in the United States currency on April 6, 1917) and that said sum should be paid to him out of the sum of $34,509.15, property of Die Deutsche Bank Filiale Nurnberg, said to be in the possession of the Alien Property Custodian and the Treasurer of the United States, or in such other manner as might be provided for by the Mixed Claim Commission.

Redirect examination:

On redirect examination, the witness testified as follows:

The circumstance under which these claims were presented to the Secretary of State, for action by the Mixed Claims Commission, were as follows: The claims here in suit had already been asserted by this action. I received a telegram that my claim before the Mixed Claim Department had to be filed by the first of January. I was in the country at that time. I rushed to San Francisco on Sunday. My children, Mrs. Humphrey and I signed the claims and they went on. It was after this matter came up here that noted how they were made out. I had already filed the suit in my own name. These funds were always mine, my children never had any funds.

The foregoing constitutes a full and complete statement of all the evidence, documentary and oral, offered or pre- [fol. 77] sented upon the trial of the above-entitled cause, and also of all of the proceedings had thereon.

After said trial, and prior to the final submission of said cause, there was filed, pursuant to the stipulation of the attorneys for plaintiff and defendants, the assignment and quitclaim of James Warren Humphrey, John Charles Humphrey, and Elizabeth Warren Humphrey, as guardian of the estate of John Charles Humphrey, a minor, together with a certified copy of the order of Court authorizing the execution of said assignment by Elizabeth Warren Humphrey, as guardian. By said assignment the said James Warren Humphrey and the said John Charles Humphrey, by his guardian, assigned all of their claims, with reference to the subject matter of the action, to the plaintiff. By stipulation of the parties, such assignment and order of Court were deemed to have been offered and received in evidence on behalf of the plaintiff, the same being deemed to have been objected to by the defendant, Die Deutsche Bank Filiale Nurnberg, upon the grounds that they were incompetent, irrelevant and immaterial.

Thereafter, and prior to the final submission of said cause, there was filed with said court a stipulation of the attorneys for the respective parties showing the rates of exchange for the conversion of marks, lawful money of Germany, into dollars, lawful money of the United States of America, were as follows: On the 24th day of January,

1920, 100 marks, lawful money of Germany, were convertible into $1.30, lawful money of the United States of [fol. 78] America. The value of one German mark, according to such rate of exchange, was, therefore, on January 24, 1920, $.013. On the 5th day of July, 1921, the current rate at which marks, lawful money of Germany, were convertible into dollars, lawful money of the United States of America, was as follows: 100 marks were convertible into $1.3725. The value of one mark, lawful money of Germany, was, therefore, on said 5th day of July, 1921, $.0137.

Pursuant to said stipulation of the parties, it was agreed that the said stipulation might be deemed to have been admitted in evidence, and that the same should be considered by the trial court in the determination of said cause.

The foregoing is herewith presented by appellants as and for their statement for use upon their appeal.

Dated, San Francisco, California, December 8, 1924.

Sterling D. Carr, United States Attorney, and T. J. Sheridan, Asst. U. S. Attorney, Solicitors for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America. Peaslee, Brigham & Gennert, Morrison, Dunne & Brobeck, Solicitors for Defendant Die Deutsche Bank Filiale Nurnberg (a Corporation).

[fol. 79] STIPULATION RE STATEMENT OF EVIDENCE

It is hereby stipulated by and between the respective parties hereto as follows:

(1) That the foregoing statement is a true, complete and properly prepared statement of the evidence adduced upon the trial of the above-entitled cause and of all the said evidence, both documentary and oral, offered or presented, upon the trial of said cause, and also of all of the proceedings had thereon;

(2) That the foregoing statement may be approved by the above-entitled court, or a Judge thereof, as and for the statement to be used by appellants upon their appeal herein;

(3) That wherever in the foregoing statement the evidence is set forth in full or reproduced in the exact words

of the witnesses, instead of being stated only in narrative form, the same is proper and desired by all the parties hereto and deemed by all of said parties to be necessary for a proper presentation of the questions presented by the appeal herein;

(4) That in the preparation of the foregoing statement, the evidence upon said trial has not been set forth in full, but has been stated in simple or condensed form, all parts not essential to the decision of the questions presented by the appeal having been omitted.

(5) That following the trial of said cause the same was taken under submission to said Court and said Court rendered its decree and judgment on the 8th day of April, [fol. 80] 1924. Thereafter, and within the time required by law Die Deutsche Bank Filiale Nurnberg filed its petition for a rehearing, which petition was joined in by the other defendants herein. Said petition for a rehearing was entertained by said Court, and was denied by its order dated October 14, 1924.

Dated San Francisco, California, Dec. 8, 1924.

Grant & Zimbars, Wm. P. Hubbard, Solicitors for Plaintiff. Sterling Carr, United States Attorney; T. J. Sheridan, Assistant United States Attorney, Solicitors for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States. Peaslee, Brigham & Gennert, Morrison, Dunne & Brobeck, Solicitors for Defendant Die Deutsche Bank Filiale Nurnberg.

In United States District Court

Judge's Certificate to Statement of Evidence

Upon the foregoing stipulation, and good cause appearing therefor, the foregoing statement is hereby found to be a true, complete and properly prepared statement of the evidence adduced upon the trial of the above-entitled cause and of all proceedings had thereon, and as such it is approved.

[fol. 81] Dated San Francisco, California, Dec. 8, 1924.

Bourquin, Judge.

Due service and receipt of a copy of the within statement of evidence is hereby admitted this 8th day of December, 1924.

Grant & Zimdars, William P. Hubbard, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

[Title omitted]

[fol. 82] Petition for Appeal—Filed December 9, 1924

Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a corporation, defendants in the above-entitled cause, feeling aggrieved by the decree rendered in said cause on the 8th day of April, 1924, do, and each of them does, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, that citation be issued as provided by law, and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such case made and provided.

And your petitioners further show that the appeal of defendants Thomas W. Miller, as Alien Property Custodian, and of Frank White, as Treasurer of the United States of America, is taken at the direction of the Department of Justice of the United States of America.

And your petitioners further pray that a proper order relating to the security to be required of them, be made, and, in this behalf, that the appeal of said Thomas W. Miller, as Alien Property Custodian, and Frank White, as [fol. 83] Treasurer, be allowed, and that the execution of

said decree as to them be superseded without the giving of any security.

Your petitioner, Die Deutsche Bank Filiale Nurnberg, desiring to supersede the execution of said decree as to it, here tenders bond in such amount as the court may require for such purpose and prays that with the allowance of this appeal a supersedeas be issued. In this behalf said Die Deutsche Bank Filiale Nurnberg represents that as said decree provides for the payment by the defendants Thomas W. Miller and Frank White, out of funds in their possession, of the moneys adjudged to be due from said bank to plaintiff, the said decree should be ordered superseded as to it through the giving of security in a nominal amount.

Peaslee, Brigham & Gennert, Morrison, Dunne & Brobeck, Solicitors for Defendant Die Deutsche Bank Filiale Nurnberg. Sterling D. Carr, United States Attorney, and T. J. Sheridan, Assistant United States Attorney, Solicitors for Defendants Thomas W. Miller and Frank White.

In United States District Court

Order Allowing Appeal—Filed December 9, 1924

The appeal prayed for in the foregoing petition is hereby allowed, and it is ordered that a supersedeas be and it is hereby allowed as to the defendants Thomas W. Miller, as [fol. 84] Alien Property Custodian and Frank White, as Treasurer, without the giving of any bond or other security, nor shall any bond be required of said defendants in connection with the taking of said appeal, it appearing that the appeal of said defendants is taken at the direction of the Department of Justice of the United States of America.

It is further ordered that a supersedeas be and it is hereby allowed as to defendant Die Deutsche Bank Filiale Nurnberg, pending the determination of said appeal, upon bond being given by said defendant as required by law in the sum of $12,500, said bond to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated December 8, 1924.

Bourquin, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 85] ASSIGNMENTS OF ERROR—Filed December 9, 1924

Now come the defendants in the above-entitled action, Thomas W. Miller, as Alien *Custodian* Property Custodian, Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a corporation, being the appellants herein, and in connection with their joint petition for an appeal, make the following assignment of errors which the said defendants and appellants respectfully aver occurred in the proceedings, decree and judgment of this cause in said court, to wit:

1. That the said court erred in giving judgment in favor of the plaintiff in any sum in excess of one dollar.

2. That said court erred in giving its decree and judgment in favor of the plaintiff and against the defendants in the sum of $11,440.275.

3. That said court erred in giving the following decree:

Decree omitted; printed side page 29 ante.

[fol. 86] The said decree was rendered pursuant to its written memorandum opinion, which is in words and figures as follows:

"Owing to the fluctuations and changes in the value of foreign exchange during and following the war, one of the questions involved in this case becomes of the utmost importance and can only be settled authoritatively by the court [fol. 87] of last resort. Other questions are not free from difficulty, but my conclusions are as follows:

"1. That the money deposited by the plaintiff in the names of his minor sons was at all times the money and property of the plaintiff and was at all times recognized by the defendant bank as such, and that the plaintiff is entitled to recover the same with or without assignments from his minor sons.

"2. That the value of the German mark in American money should be determined as of the time of the breach

of duty or the accrual of the cause of action. Page vs. Levenson, 281 Fed. 555; Guiness vs. Miller, 291 Fed. 768; Same vs. Same, Id., 769.

"3. That that amount should bear interest from the close of the war at the rate prescribed by the law of the forum. The time of the accrual of the cause of action becomes important for the reason that the value of the German mark must be determined as of that date.

"The testimony on the part of the plaintiff as to the different demands made is halting and unsatisfactory, but I am of the opinion that a sufficient demand was made under date of June 12, 1915, in view of the reasons assigned for a refusal to comply therewith, and the utter futility of a more definite and positive demand.

"A decree will, therefore, be entered in favor of the plaintiff for the balance due, based on the value of the German mark as of the above date with interest at the rate agreed upon by the parties up to the date of our entry into [fol. 88] the war, to which will be added interest on the principal sum at the rate prescribed by the laws of this state from the close of the war.

"Let a decree be submitted accordingly."

It is merely a matter of computation to determine, from the total figure of the money judgment, the several amounts allowed by the trial court as principal and interest. Again, by mere computation, it may be determined the dates adopted by the trial court for the conversion of marks, money of Germany in which the deposits involved in the action were expressed, into dollars, money of the United States in which any judgment of the court must be expressed. The following is an excerpt from a letter of plaintiff's attorneys, appended as Exhibit "A" to the petition of defendant Die Deutsche Bank Filiale Nurnberg for a rehearing, and the same shows ther method adopted by the trial court in arriving at the figure of $11,440.275, the total amount of the Court's judgment:

"That plaintiff have and recover the sum of $11,440.275, being the amount of the money with interest figured to March 23, 1924, in accordance with the opinion filed.

"In the agreed statement of facts, it is stipulated that on June 30, 1917, the amount owing on the two accounts

(Charles Franklin and Frau Elizabeth, and the account of James Warren and John Charles Humphrey) is the sum of 41,897.40 marks principal and interest.

"Under the opinion, interest is to be figured up to the date that the United States entered the war which was [fol. 89] April 6, 1917, at the rate contracted to be paid by the bank. In order, therefore, to lessen the amount of 41,897.40 marks, which is shown by your statement as being due on June 30, 1917, to the amount which was owing on April 6, 1917, we have figured three months interest at the rate of 2% per annum, and subtracted that amount from 41,897.40, leaving the amount owing on April 6, 1917, 41,688.20 marks.

"We have then passed over the interval from April 6, 1917, to July 30, 1919, as being a period of time barren of interest. This date, July 3, 1919, is the date of the cessation of war between the two countries, and after which date it was lawful for the inhabitants of the one country to transact business with the inhabitants of the other country.

"We have then figured interest on 41,688.20 marks at the rate of 7% per annum from July 3, 1919, to March 23, 1924, and have the amount of 55,468 marks. This sum of 55,468 marks, we have converted into dollars by multiplying by the decimal .825 and then dividing by four, which method of conversion is agreed to in the statement of facts as the method of ascertaining the value of marks on June 12, 1915, the date the court finds the demand was made."

4. That said court erred in giving judgment in favor of the plaintiff and against the defendants in the sum of $11,440.275, which is for the sum of 55,468 marks, lawful money of Germany, converted from such Geman money into American dollars, lawful money of the United States of America [fol. 90] at the rate of exchange existing between such countries on the 12th day of June, 1915.

5. Said court erred in giving judgment in favor of the plaintiff and against defendants for the sum of Five Hundred Four Dollars ($504.00), which is the sum of twenty-four hundred and more marks, shown by the admitted facts to have been deposited by the plaintiff with the defendant bank, or credited to plaintiff's account by defendant bank, at dates subsequent to the date on which the said court found that plaintiff had made a demand for payment (June 12, 1915).

6. That said court erred in giving judgment for plaintiff and against the defendants in the sum of $247.08, which is the sum of 1,198 marks, the "agreed interest" upon the bank balances in dispute from June, 1915, to April, 1917, converted into marks, as of June 12, 1915. It was admitted that no demand was made for the payment of said sum at any time prior to the termination of the war between United States and Germany on or about the 2d day of July, 1921.

7. The said court erred in giving judgment for plaintiff and against the defendants in the sum of $1,203.74, which is the interest at the rate of 7% per annum (the legal rate prevailing in California), from July 3, 1919 (the date adopted by said court as the date of the termination of the war between the United States and Germany), to July 2, 1921, (the date agreed upon between the parties as the date of termination of said war), upon the balance of the bank accounts on deposit with defendant bank on the 6th day of [fol. 91] April, 1917, including interest at a rate "agreed upon" between the parties from the 12th day of June, 1915, until the 6th day of April, 1917.

8. That said decree and judgment is against law.

9. That said decree and judgment is not supported by the evidence, and the implied findings of said court are not supported by the evidence, in the following particulars:

(a) There is no evidence to support the court's implied finding that 2,445.40 marks, shown by the admitted facts to have been deposited by plaintiff, or credited to plaintiff's account with defendant subsequently to June 12, 1915, the date of the alleged demand, was demanded by plaintiff to be repaid to him.

(b) There is no evidence to support the court's implied finding that 1,198 marks, agreed interest upon the bank deposits in dispute from June 12, 1915 to April 6, 1917, was demanded by plaintiff to be paid to him on June 12, 1915. The admitted facts show that the sum of 1,198 marks was agreed upon between plaintiff and defendant bank as interest accrued upon the moneys on deposit with said bank from and after the alleged demand of June 12, 1915, to and including the commencement of war between the United States Government and the German empire, on or about the 6th day of April, 1917. The admitted facts show

that no demand was ever made for this money until after [fol. 92] the termination of the war between United States and Germany, agreed by the parties to be July 2, 1921.

(c) The said Court's implied finding that plaintiff made demand upon defendant bank on or about the 12th day of June, 1915, for the payment of all moneys on deposit to plaintiff's credit with defendant bank is unsupported by the evidence. The admitted facts, on the contrary, show a continuance of the relationship between plaintiff and defendant bank, with their mutual consent, the rendering of statements, the computing of interest, the remitting of interest, the performance of banking services, the solicitation by plaintiff for banking services from defendant bank, and many other matters irreconcilably in conflict with what the trial court expressly styled in its opinion "the halting and unsatisfactory" testimony of plaintiff concerning the alleged demands made by him on defendant bank during June of 1915.

(d) The implied finding of the court that the state of war which existed during 1917, 1918, 1919, 1920 and 1921 between the United States Government and the German empire terminated on July 3, 1919, the date from which the court gave judgment for interest at the legal rate obtaining in California upon the balances of plaintiff with defendant bank, is unsupported by the evidence, for the reason that the agreed facts, presented to the trial court in the form of a stipulation, stated that a state of war existed between the United States Government and the German empire continuously from the 6th day of April, 1917, until the 2d day of July, 1921.

[fol. 93] 10. Said judgment and decree is against law and is unsupported by the testimony, in so far as it permits a recovery by plaintiff of the sum of 18,036.60 marks, shown by the agreed statement of facts to have been on deposit during the dates in controversy with the defendant bank to the credit of James Warren and John Charles Humphrey, sons of the plaintiff, one of whom was of age at the time of the judgment rendered herein.

11. The said decree is against law in that it appears upon the face of said decree that the rate of exchange adopted by court for the conversion of German marks into

dollars was the rate of exchange prevailing between the United States and Germany on the 12th day of June, 1915.

12. The said decree is against law in so far as it permits a recovery against the defendant Die Deutsche Bank Filiale Nunberg individually.

13. The said decree is unsupported by the evidence in so far as it purports to bind the defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer, in that no evidence was introduced in support of plaintiff's case which was binding upon said defendants.

14. The court was without jurisdiction to render any judgment or decree in this suit brought under Section 9 of the Trading with the Enemy Act, because the defendant Duetsche Bank was not an "enemy" within the meaning of Section 9 of that act at the time this suit was commenced or at any time thereafter.

[fol. 94] 15. If in support of its decree the court interpreted the word "enemy," occurring in the phrase "to whom any debt may be owing from an enemy" in Section 9 of the Trading with the Enemy Act, to be applicable to persons in the position of the defendant Deutsche Bank after the end of the war, then the act so interpreted is unconstitutional because it deprives the defendants, none of whom was an enemy at the time this suit was commenced, of the right of trial by jury in a suit to establish a common-law debt.

Wherefore, the said appellants pray that said judgment be reversed and that they severally be allowed to go hence and recover their respective costs.

Dated at San Francisco, California, December 8, 1924.

Die Duetsche Bank Filiale Nurnberg, by Peaslee, Brigham & Gennert and Morrison, Dunne & Brobeck, Its Solicitors. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America, by Sterling D. Carr, United States Attorney, and T. J. Sheridan, Assistant United States Attorney, Their Solicitors.

[fols. 95 & 96] [File endorsement omitted.]

Supersedeas bond on appeal for $12,500, approved and filed December 9, 1924, omitted in printing.

[fols. 97 & 98] In United States District Court

Order for Supersedeas—December 9, 1924

Good cause appearing therefor, it is hereby ordered that the foregoing supersedeas bond be and the same is hereby approved, and that the decree in the above-entitled cause be, and the same is hereby stayed and superseded during the pendency of the appeal of the defendants herein.

Bourquin, United States District Judge.

[fol. 99] In United States District Court

[Title omitted]

Præcipe for Transcript of Record

To Walter B. Maling, Esquire, clerk of the above entitled court:

You are hereby notified that the following portions of the record are to be incorporated into the transcript upon the appeal of the defendants in the above-entitled cause to the Circuit Court of Appeals for the Ninth Circuit:

1. Complaint.
1a. Amended complaint.
2. Answer of defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer.
3. Answer of defendant Die Deutsche Bank Filiale Nurnberg.
[fol. 100] 4. Opinion of Court, dated February 10, 1924.
5. Decree dated April 8, 1924.
6. Order extending term, filed July 7, 1924.
7. Order denying defendants' petition for a rehearing, dated October 14, 1924.
8. Statement of evidence, together with stipulation, and order approving same.
9. Petition for appeal.
10. Order allowing appeal and fixing amount of bond.

11. Assignment of errors.
12. Citation on appeal.
13. Supersedeas bond.
14. Præcipe on appeal.
15. Certificate of Clerk of the United States District Court to record on appeal.

Dated San Francisco, California, December 8, 1924.

Sterling D. Carr, United States Attorney; T. J. Sheridan, Assistant United States Attorney, Solicitors for Defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer. Peaslee, Brigham & Gennert, Morrison, Dunne & Brobeck, Solicitors for Defendant Die Deutsche Bank Filiale Nurnberg.

IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed December 9, 1924

It is hereby stipulated that the portions of the record re-
[fol. 101] ferred to in the foregoing præcipe may be incorporated in the transcript on appeal and that the same shall constitute the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the United States District Court in the above-entitled cause, and that the same may be certified as such.

Dated San Francisco, California, December 8, 1924.

Grant & Zimdars, Wm. P. Hubbard, Solicitors for Plaintiff.

Due service and receipt of a copy of the within præcipe is hereby admitted this 8th day of December, 1924.

Grant & Zimdars, William P. Hubbard, Attorneys for Plaintiff.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript of record from District Court omitted in printing.

[fols. 102–106] Citation, in usual form, showing service on Grant & Zimdars and Wm. P. Hubbard, filed December 9, 1924, omitted in printing.

[fol. 107] Minute entry of argument and submission March 26, 1925, omitted in printing.

[fol. 108] In United States Circuit Court of Appeals, Ninth Circuit

Order to File Certain Papers—August 3, 1925

By direction of the Honorable William B. Gilbert, William H. Hunt and William W. Morrow, Circuit Judges, before whom the case was heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court, in each of the causes in accordance with the opinion filed therein: Thomas W. Miller, as Alien Property Custodian, for the United States of America, Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a Corporation, Appellants, vs. Charles Franklin Humphrey, Appellee. No. 4447. * * *

[fol. 109] In United States Circuit Court of Appeals

No. 4447

Thomas W. Miller, as Alien Property Custodian for the United States of America; Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a Corporation, Appellants,

vs.

Charles Franklin Humphrey, Appellee

Before Gilbert, Hunt, and Morrow, Circuit Judges

Opinion—Filed August 3, 1925

This suit was brought on July 9, 1921, under the Trading With the Enemy Act (Oct. 6, 1917, Ch. 106, 40 St. L. 411, 419). The appeal is from a decree in favor of Humphrey,

appellee herein, against the Deutsche Bank Filiale Nurnberg, a German Banking corporation, and Miller as alien property custodian, and White as Treasurer of the United States.

Humphrey, a citizen of the United States and a resident of California, was in Germany prior to November, 1914, and deposited funds in the appellant bank in Germany. He sues to establish a debt claimed, and to have the judgment [fol. 110] paid out of moneys of the bank impounded in the United States by the alien property custodian. The deposits were made by Humphrey in 1913 in two separate accounts, one in the name of himself and his wife, subject to the order of either, and the other in the names of his two minor sons, "subject only" to Humphrey's order, or in the event of his death, to the order of his wife. The answer of the bank denied the indebtedness as alleged, pleaded that the complaint was insufficient in failing to allege a demand for the payment, and that no demand had been made upon the bank by or on behalf of Humphrey. The alien property custodian and the Treasurer of the United tSates answered, making formal denials but neither participated in the trial.

The District Court held that the money in both accounts was at all times Humphrey's money and was so regarded by the bank; that demand had been made by Humphrey about June 12, 1915; that the value of German marks reduced to American money for the purpose of expressing the judgment should be ascertained and determined as of the date of the breach of duty to pay, or accrual of the cause of action, and that Humphrey was entitled to recover interest from the time of the demand until the entry of the United States into the war, April 6, 1917, at the rate agreed upon by Humphrey and the bank. Between April 6, 1917, and July 3, 1919, no interest was allowed. Then from the time of the cessation of the war, July 3, 1919, interest was allowed at the legal rate of interest in California. Decree [fol. 111] was made accordingly against the bank, and directed that payment should be made out of $34,508.13, moneys belonging to the bank which were in possession and under the control of the alien property custodian and White as Treasurer, as aforesaid.

HUNT, Circuit Judge, after stating the facts:

Appellant bank presses the contention that as to the joint account of Humphrey and his wife, there never was a demand for closing such account and withdrawal of the sum therein credited, and that therefore, no cause of action accrued to Humphrey against the bank; and that there was no demand with respect to the account of the two sons.

The substance of Humphrey's testimony was that in August and November, 1914, and about June 12, 1915, he made a demand for the payment of the whole sums represented in the several accounts; that a director in charge of the bank told him that a moratorium had been declared and that he could have the usual amounts that he had been accustomed to use, but not the total sum represented by the accounts. Humphrey said that after June 12, 1915 he had deposited coupons on German bonds and dividends on the bank's shares. He could not recall all the different conversations with the bank officials, but testified that in August, 1914, the bank officials looked up his accounts, asked how much he had used, and told him that he should not take any securities out of Germany; that after the August de- [fol. 112] mand he had left certain German and Hungarian securities in the bank for collection. Defendant bank made no objection of any kind to the testimony of plaintiff, and called no officer or representative of the bank to refute what Humphrey said. The bank, however, endeavors to break the force of Humphrey's evidence by reference to certain correspondence between Humphrey and the bank. It is unnecessary to set out these writings, but for convenience they may be placed in three groups; letters exchanged before June 12, 1915, a letter written by the bank to Humphrey on June 12, 1915, and letters that were exchanged after June 12, 1915. Those exchanged before June 12th referred to deposits, interest accumulations and to collections of bonds by the bank for the account of Humphrey. We can infer nothing more from them than that Humphrey was carrying on, and then apparently expected to continue, relations with the bank. The letter of June 12, 1915, from the bank addressed to Humphrey at Vevey, Switzerland, contained advices to Humphrey that upon that day the bank had received from Geneva and redeemed a certain deposit certificate of the writing bank for 41,000 marks, and would render interest statement together with semi-annual statement as per

June 30th. We do not find anything in this letter that is inconsistent with the testimony of Humphrey that upon that day Humphrey was in Nurnberg and made a demand for all of his funds. The bank, in ordinary course of business, might have formally written to Humphrey of the transaction referred to in the letter, either before or after [fol. 113] his visit to the bank. The letters that were dated and exchanged after June 12th also impress us as ordinary correspondence pertaining to banking transactions; one directed the bank to pay certain costs of insuring and sending bonds to the Berlin bank (defendant bank's associate); another referred to a contemplated loan, with request for statements; and in one Humphrey asked for the assent of the bank to his drawing money from the bank's funds held by the alien property custodian in the United States. In weighing the several letters in connection with Humphrey's oral testimony, we may look in retrospect and consider the history of the times, the unusual conditions which prevailed in Germany about and after August 1st, 1914, the serious situation which then surrounded Humphrey which may have influenced his actions.

We attach no significance to the fact that Humphrey's demand was oral. The bank having told the depositor that it availed itself of the privilege which usually goes with a moratorium, should not now be heard to say that because the demand was not in writing it can avoid recognition of the obligation.

Recurring to the account standing in the names of the two sons, we think it clear that Humphrey himself had control of the account during his lifetime, and that his attitude of control was made plain in December, 1913, when he wrote to the bank, saying the funds were "only drawable by me," but in case of his death by Mrs. Humphrey. Furthermore, as showing that the bank understood his letter [fol. 114] there are the accounts rendered by the bank, exhibiting the aggregate of the balance of the two accounts in one statement. It is true that in December, 1922, the two boys and their father made a verified petition in the way of a claim to the Secretary of State for 23,683 marks, as of April 6, 1917, as sole owners of the funds claimed, deposited to their order. Humphrey's explanation of this is that he had previously asserted his claim for all the money involved in this suit, and that the funds were always his and

never belonged to his children; that in order to get the claims filed with the Mixed Claims Commission by January 1, 1924, he and his wife had signed the claims which were filed. There was no attempt to change the legal status or to repudiate the theretofore asserted claim of ownership by the father, and in our opinion it would be very unjust to construe the petition as estopping him from asserting the true ownership.

It is said that the amount represented by the account standing in the names of the boys was not filed with the alien property custodian and that no notice thereof was given to the President. But the stipulated facts are that all the sums deposited in either of the accounts mentioned in the preceding paragraph of the statement were made by plaintiff from moneys which before they were deposited were the sole property of the plaintiff or of the plaintiff and his wife; also, that about October 15, 1918, this plaintiff filed with the alien property custodian of the United States his notice of claim in form as required by the Trading [fol. 115] With the Enemy Act, claiming payment from funds deposited in the bank by the plaintiff, and that subsequently about June 24, 1920, Humphrey made application to the President for the allowance of his claim, but that no action was taken then or thereafter by the President. Both accounts, one in the names of Humphrey and his wife, and the other in the names of the boys, are attached to the statement of facts as exhibits, and the statement relates to the two. Our conclusion being that Humphrey is sole owner of the funds, we must decide what interest he should be allowed.

It must be accepted that between the date of Humphrey's demand, June 12, 1915, and June 30, 1917, when the German custodian took his money, the bank could and should have paid him. But it failed to do so—as did it fail to authorize payment after October, 1919, when Humphrey wrote requesting assent to his drawing the money out of funds on hand with the alien property custodian for payment of American claims. The argument that Humphrey was guilty of laches ought not to prevail, for he instituted this suit in July, 1921, which fact, considered with the dates given in the record, are evidence that he moved with reasonable diligence in asserting his claim. Thus far, however, he has never received an offer by the bank to pay any sum.

Under such circumstances, it is fair that he should be allowed interest at the rate agreed upon by Humphrey and the bank from June 12, 1915, when the United States entered the war. From April 6, 1917, to July 3, 1919, all [fol. 116] communication between the bank and Humphrey was cut off, and as the lower court did not allow interest for that period, no question is presented upon the point. But after July 3, 1919, communication between the parties was available, although until July, 1921, a state of war between the United States and Germany still existed.

In Miller vs. Robertson, 266 U. S. 243, a suit brought under section 9 of the Trading With the Enemy Act to establish a debt claimed to be owing by enemy defendants the Court said: "The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained." That statement, taken as the law generally, must rest as authority for sustaining the less comprehensive proposition involved in the present case, that the enemy defendant, as a matter of law, cannot be relieved from interest after the cessation of the war and after July 3, 1919, the date when restrictions of intercourse between Germany and this country were removed. (Robertson vs. Miller, 286 Fed. 503; Guinness vs. Miller, 291 Fed. 768).

The contract fixed no rate of interest after Humphrey made his demand and it was refused. The Court, therefore, was justified in allowing interest by way of damages, as prescribed by the law of California. (Equitable Trust Co. vs. Western Pacific R. R., 244 Fed. 585; Robertson vs. Miller, 286 Fed. 503).

No doctrine of estoppel will be applied against Humphreys because of the allegation of his complaint that a state [fol. 117] of war existed from April 6, 1917, until July 2, 1921, and that during that period the bank was an alien enemy as defined by the Trading With the Enemy Act. As an averment of precise fact that was accurate, and not in conflict with the fact that peace was established July 3, 1919.

As already stated, the decree in favor of plaintiff was based on the value of the German mark as of June 12, 1915. Upon this phase of the case our view is that the rule controlling the measure of Humphrey's recovery is based upon the proper exchange at the time the demand was made.

(Guinness vs. Miller, supra.) That was a suit under section 9 of the Trading With the Enemy Act, by a citizen to recover a debt owed by a German on a stated account payable in marks. Judge Learned Hand stated that the only question was whether the decree should be the value in dollars of the marks when the account was stated, or for their value as of the date of the decree. In clear terms he pointed out that there is no sound basis for a distinction between torts and contracts to pay fixed sums of money, and regarded the form of the obilgation as one to indemnify the victim for his loss in terms of the money of the foreign sovereign, saying: "That obligation necessarily speaks as of the day when it arose, that is, when the loss occurred. Nor in Dante vs. Miniggio, 298 Fed. 845, did the Court give favorable consideration to the contention that in actions of tort the rule differed from that on contract. In Page vs. Levinson, 281 Fed. 555, Judge Rose, in a carefully con-[fol. 118] sidered opinion, also held to the same general doctrine. Grunwald vs. Freese, 4 Cal. (unreported), 34 Pac. 73, is in harmony with the federal cases.

The appellant in criticism of some of the cases referred to in Guinness vs. Miller, supra, and Page vs. Levinson, supra, says that the Judges who wrote did not always discriminate between foreign debt contracted in a foreign country, payable in the foreign country, in the currency of the foreign country, and unliquidated damages whether arising out of contract or out of tort. We shall not enter into a detailed analysis of the cases bearing upon that suggestion, further than to say that the recent decisions in actions brought in tort or contract, apply the principle that if a bank is under obligation to pay money, marks in Germany upon a demand of a depositor in Germany, it should have the marks and make the payment; if it fails, and the depositor has to sue, the law ought to give him just as much as he would have received if the contract had been lived up to. In The Verdi, 268 Fed. 908, which was an action for damages for a collision in New York in 1915 between British owned ships, some of the repairs being made in New York and some in England, January 1, 1916, being taken as the date upon which all damages were ascertainable, the District Court decided that the damages should be determined by taking the rate of exchange existing on January 1, 1916. The argument was that damages could not be determined

until final decree, because the action sounded in tort, and that the rate of exchange then prevailing should be adopted. [fol. 119] Judge Augustus Hand said that the case was not one of transmitting pounds sterling to New York, but of finding their equivalent in dollars on January 1, 1916, and that could only be done by employing the rate of exchange prevalent at that date, and as the initial damages were calculated in pounds, they must be converted into dollars at the par value of pounds at the time and place of payment. Judgment was based upon the value in United States currency of the equivalent of the foreign money on the date of the demand, rather than the date of the rendition of the judgment. It follows that the District Court was right in decreeing the date for establishing the rate of exchange was the date the moneys should have been paid in Germany, that is, June 12, 1915. (Story on Conflict of Laws, 8 Ed. 426; Hoppe vs. Russo Asiatic Bank (N. Y.), 138 N. E. 497; note to De Ferinando vs. Smits, 11 A. L. R. 363; note to The Celia, 20 A. L. R. 899; Guinness vs. Miller, 299 Fed. 538).

The decree was affirmed.

[File endorsement omitted.]

[fol. 120] In United States Circuit Court of Appeals

[Title omitted]

Judgment—Filed August 3, 1925

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This cause came on to be heard on the transcript of the record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 121] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—Filed September 2, 1925

Upon motion of Messrs. Dunne, Brobeck, Phleger and Harrison, counsel for Die Deutsche Bank Filiale Nurnberg, a Corporation, Appellant, in above cause, and good cause therefor appearing, it is ordered that the issuance of the mandate of this Court under Rule 32 in the above-entitled cause be, and hereby is stayed until the petition to be made on behalf of the said appellant to the Supreme Court of the United States for the issuance of a writ of certiorari herein be disposed of, on condition that the said petition be docketed in the said Supreme Court on or before October 5th, 1925.

Hunt, U. S. Circuit Judge.

Dated San Francisco, California, September 1, 1925.

[File endorsement omitted.]

[fols. 122 & 123] Clerk's certificate to foregoing transcript of record from United States Circuit Court of Appeals omitted in printing.

[fol. 124] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 23, 1925

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

OCT 5 19
WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]224

THE PETITION OF DIE DEUTSCHE BANK FILIALE NURNBERG, A CORPORATION, FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO BRING BEFORE THE SUPREME COURT THE CASE OF

CHARLES FRANKLIN HUMPHREY,
Plaintiff-Appellee,

against

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA, FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA, AND DIE DEUTSCHE BANK FILIALE NURNBERG, A CORPORATION,
Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

PEASLEE, BRIGHAM AND GENNERT,
Solicitors for Petitioner.

AMOS J. PEASLEE,
Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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(2) The Circuit Court of Appeals erred in holding that there was sufficient evidence of a demand on the bank to place it in default, and also erred in allowing the pre-war rate of exchange even as to other deposits made at a later time and as to which there is no evidence whatever that there ever was any demand for the sums prior to the institution of the suit..... 15

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Supreme Court of the United States

OCTOBER TERM, 1925

No.

In the Matter of the Petition

OF

DIE DEUTSCHE BANK FILIALE NURNBERG, a Corporation, for a Writ of Certiorari directing the United States Circuit Court of Appeals for the Ninth Circuit to bring before the Supreme Court the case of

CHARLES FRANKLIN HUMPHREY,
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG, a Corporation,
Defendants-Appellants

SIRS:

PLEASE TAKE NOTICE that the annexed petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Monday, November 2, 1925.

Dated, New York, October 2, 1925.

PEASLEE, BRIGHAM AND GENNERT,
Solicitors for the petitioner.

To:

GRANT & ZIMDARS, Esqs.,
and
WILLIAM P. HUBBARD, Esq.,
Counsel for Plaintiff,
San Francisco, Cal.

STERLING D. CARR, Esq.,
United States Attorney,
Post Office Building,
San Francisco, Cal.
Counsel for Defendants, Thomas W. Miller, Alien Property Custodian, and Frank White, as Treasurer of the United States of America.

To the

SUPREME COURT OF THE UNITED STATES

The petition of Die Deutsche Bank Filiale Nurnberg, a Corporation, for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit to bring before the Supreme Court the case of

Charles Franklin Humphrey,
Plaintiff-Appellee

against

Thomas W. Miller as Alien Property Custodian for the United States of America, Frank White as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a Corporation,
Defendants-Appellants

October Term, 1925.
No.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Die Deutsche Bank Filiale Nurnberg, a German Corporation, respectfully shows to this court as follows:

This is a petition for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Ninth Circuit rendered August 3, 1925, which affirmed a decree of the Southern Division of the United States District Court for

the Northern District of California, Second Division, against your petitioner and Thomas W. Miller as Alien Property Custodian for the United States and Frank White as Treasurer of the United States.

The suit was brought under Section 9 of the Trading with the Enemy Act, as amended, (40 Stat. L. 411) to recover out of the funds in the possession of the Alien Property Custodian an alleged German mark indebtedness from your petitioner to the plaintiff.

The principal question of law in the case is the question as to the rate of exchange at which the German mark indebtedness, which arose prior to the entry of the United States into the war, is to be converted into dollars in rendering the judgment.

There are two cases now pending before the Supreme Court involving this same question, to wit, the case of *Guinness et al.* v. *Hicks et al.*, which is No. 80 on the calendar of the October Term, 1925, which was brought to the Supreme Court upon writs of certiorari granted on June 9, 1924, and the case of *Zimmermann et al.* v. *Hicks et al.*, which is No. 629 on the calendar of the October Term, 1925.

A conflict of authority has existed in the lower courts and among the state courts as to whether the *date of judgment* or the *date of breach of contract*, governs in computation of the rate of exchange in such cases. The case at bar also involves certain questions relating to the relations of a bank to its depositors and the necessity for the making of a demand in order to mature the obligation, which questions are likewise involved in the said case of *Zimmermann et al.* v. *Hicks et al.*

There are a number of other cases now pending in the lower courts involving the question of the applicable rate of exchange with respect to such suits. Unless a writ of certiorari is granted in this case, the decision of the Circuit Court of Appeals for the Ninth Circuit will become final against your petitioner in advance of a full hearing and final deter-

mination by the Supreme Court of the important questions of law involved, and the writ is therefore requested in order that a uniform rule may be applied equitably to all cases of this character.

Facts and Pleadings.

1. Your petitioner was at the time of the commencement of this suit and now is a bank incorporated under and existing by virtue of the laws of Germany and was at all the times hereinafter mentioned and now is conducting a general banking business in the City of Nurnberg, Germany.

2. The plaintiff Charles F. Humphrey was at the time of the commencement of this suit a citizen of the United States and a resident of the State of California.

3. Prior to August, 1914 the plaintiff opened two deposit accounts in German marks with your petitioner at its bank in Nurnberg, Germany, one in the names of C. F. Humphrey and Elizabeth Humphrey, his wife, (R. 38, 46, 47) and the other in the names of James Warren Humphrey and John Charles Humphrey, his sons (R. 38, 48, 49). The deposits and withdrawals were at all times made in terms of German marks and both deposit accounts were credited from time to time with interest in terms of German marks.

4. On April 6, 1917, war was declared between the United States and Germany (R. 41). On or about June 30, 1917 your petitioner, in accordance with the laws of Germany and by compulsion of the Imperial German Government, paid over to the German Treuhander (the Alien Property Custodian) the amount of the balances remaining on deposit in the two accounts, being 23860.80 marks in the account of C. F. Humphrey and Elizabeth Humphrey, and 18036.60 marks in the account of James Warren Humphrey and John Charles Humphrey (R. 39, 46-49).

5. Prior to October 16, 1919, the Alien Property Custodian of the United States seized property valued at $34,508.13 belonging to your petitioner and paid the money over to the Treasurer of the United States for the account of the Deutsche Bank (R. 40).

6. On October 15, 1918, C. F. Humphrey filed a notice of claim with the Alien Property Custodian of the United States under the provisions of the Trading with the Enemy Act (40 Stat. L. 411), as amended by the Act of June 5, 1920, (41 Stat. L. 977) for the sums deposited in the two accounts, (R. 40).

7. On July 9, 1921 the plaintiff commenced this suit in equity to recover the sum of 78,308.65 marks with interest computed in United States currencey, at the rate of exchange prevailing in the United States on April 6, 1917, the day of the declaration of war between the United States and Germany, and alleged to be 18.5¢ per mark (R. 2-13).

8. On December 23, 1922 the plaintiff and his sons also filed separate claims for the same amounts claimed in this suit before the Mixed Claims Commission—United States and Germany (R. 70 and 75).

9. The defendants Thomas W. Miller as Alien Property Custodian of the United States and Frank White as Treasurer of the United States, interposed an answer to the complaint as amended by the plaintiff, admitting that the Alien Property Custodian had taken over as the property of an enemy within the purview and meaning of the Trading with the Enemy Act, certain money said to be the property of the Deutsche Bank of Nurnberg, Germany, and paid into the Treasury of the United States, but denying sufficient information to form a belief as to the truth of the allegations regarding the deposit accounts of the plaintiff with the Deutsche Bank and the value of the German mark at the date of the declaration of war between the United States and Germany, and further alleging that whatever recovery may be granted to the plaintiff must be computed in United

States currency at the rate of exchange prevailing at the date of judgment or decree in this suit (R. 14-17).

10. Your petitioner, the defendant Deutsche Bank, interposed an answer denying that the plaintiff had ever deposited with the Deutsche Bank sums aggregating 78,308.65 German marks, but admitting that a total of 23,860.80 marks, which includes interest, was on deposit with the defendant to the credit of the plaintiff on June 30th, 1917, and alleging that whatever recovery may be granted to the plaintiff must be computed in United States currency at the rate of exchange prevailing at the date of the judgment or decree in this suit. For a further, separate defense your petitioner alleged that the complaint did not allege a demand or order by or on behalf of the plaintiff upon the defendant bank for the whole or any part of the deposit account and further alleged that no demand in fact had been made upon it by or on behalf of the plaintiff for the payment of the whole or any part of the deposit accounts (R. 18-25).

11. Certain facts were stipulated by the parties (R. 37, 79) and evidence was also taken at the trial relating to the question of demand.

Decision of the District Court.

12. On January 18, 1924, the suit came on for trial before the Honorable Frank H. Rudkin, Circuit Judge for the Ninth Circuit, who, on March 11, 1924, filed his decision to the following effect (R. 27-28): that the plaintiff was entitled to recover the amount of the deposits remaining in both the accounts; that the value of the German mark should be computed at the rate of exchange prevailing at the time of the accrual of the cause of action; that a sufficient demand had been made on June 12, 1915 to give rise to a cause of action; that interest at the rate agreed upon between the parties should be awarded from that date until April 6, 1917, the date of the declaration of war between the United States and

Germany; that interest at the rate prescribed by the laws of California should be awarded from the date of the termination of the war; that the war ended July 3, 1919.

13. On April 8, 1924 a decree in accordance with this decision was made and entered granting judgment to the plaintiff in the sum of $11,440.275, with interest from March 24, 1924 against your petitioner and directing the defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States to pay the same out of the funds of your petitioner in their possession (R. 29-30).

14. On December 8, 1924 your petitioner, together with Thomas W. Miller as Alien Property Custodian of the United States and Frank White as Treasurer of the United States, took an appeal from this decree to the United States Circuit Court of Appeals for the Ninth Circuit (R. 82).

Assignment of Errors.

15. A certified transcript of the record and of all the proceedings in the case was duly transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. Your petitioner filed an assignment of errors (R. 85) in which it alleged, among other things, that the court erred in awarding the plaintiff the sum of $11,440.275 as against the defendants; in holding that the plaintiff on June 12, 1915 had made a demand upon the defendant bank for the payment to him of the amounts of the balance on deposit with the defendant bank in the two accounts; in holding that the value of German marks to which the plaintiff was held entitled in United States currency was to be computed at the rate of exchange prevailing on June 12, 1915; in awarding the plaintiff judgment as against the defendants the sum of $504, the value on June 12, 1915 of the sum of 2445.40 marks which admittedly were deposited by the plaintiff with the defendant bank and credited to the plaintiff's account

by the defendant bank subsequent to June 12, 1915, the date of the alleged demand; in awarding the plaintiff judgment as against the defendants for the sum of $247.08, the value on June 12, 1915 of 1198 marks which was the "agreed interest" upon the bank balances in dispute from June, 1915 to April, 1917, it being admitted that no demand was made for the same on June 12, 1915; in awarding the plaintiff judgment against the defendants for $1,203.74 as interest at the rate of 7% per annum on the balance of the deposit account on April 6, 1917, from July 3, 1919 (the date adopted by the District Court as the date of the termination of the war between the United States and Germany) to July 2, 1921 (the date agreed upon between the parties as the date of termination of said war); in holding that the war between the United States and Germany ended on July 3, 1919 and not on July 2, 1921; in awarding the plaintiff judgment for the sum of 18036.60 marks on deposit to the credit of James Warren Humphrey and John Charles Humphrey, sons of the plaintiff; and in awarding the plaintiff judgment against the defendant the Deutsche Bank individually.

Decision of Circuit Court of Appeals.

16. The appeal by Thomas W. Miller as Alien Property Custodian of the United States of America, and Frank White as Treasurer of the United States of America, and your petitioner came on to be heard and was argued by counsel before Circuit Judges Gilbert, Hunt and Morrow. On August 3, 1925, the said Circuit Court of Appeals for the Ninth Circuit rendered its decree and filed an opinion written by Judge Hunt, affirming the said decree of the said District Court, and which, among other things, held (R. 109-119) that a sufficient demand for the payment of the balance in the two accounts had been made by the plaintiff on June 12, 1915; that the plaintiff was entitled to payment of the amount of the balance to the credit of his sons, James Warren Humphrey and John Charles Humphrey; that the plaintiff

was entitled to interest from June 12, 1915 until April 6, 1917 at the rate agreed upon between the parties; that the plaintiff was entitled to interest at the rate of 7% per annum prescribed by the law of the State of California from July 3, 1919 because "communication between the parties was available"; that the amount of German marks to which the plaintiff was entitled was to be computed in United States currency at the rate of exchange prevailing on June 12, 1915, "at the time the demand was made."

Order Staying Issuance of Mandate.

17. On September 1, 1925 the said Circuit Court of Appeals for the Ninth Circuit, by the Hon. William H. Hunt, U. S. Circuit Judge for the Ninth Circuit, granted an order staying the issuance of a mandate in this cause, reading as follows:

> "Upon motion of Messrs. Dunne, Brobeck, Phleger & Harrison, counsel for Die Deutsche Bank Filiale Nurnberg, a Corporation, Appellant, in above cause, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate of this Court under Rule 32 in the above entitled cause be, and hereby is stayed until the petition to be made on behalf of the said Appellant to the Supreme Court of the United States for the issuance of a writ of certiorari herein is disposed of, on condition that the said petition be docketed in the said Supreme Court on or before October 5, 1925."

18. A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed and marked "Exhibit A," as part of this application in conformity with Rule 35 of this Court.

Statutory Provisions for invoking Jurisdiction.

19. Your petitioner is advised and believes that the said decree of the said United States Circuit Court of Appeals in the said case is final, and is erroneous, and that this Honor-

able Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of Sec. 240, subdivision A, of the Act of Congress entitled "An Act to Amend the Judicial Code, and to further Define the Jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes", approved February 13, 1925.

WHEREFORE your petitioner prays that a writ of certiorari in this case be issued to the Circuit Court of Appeals for the Ninth Circuit to bring up this case to this Honorable Court for such proceeding therein as may seem just, and to direct that the transcript of record filed herewith be accepted as the return to the certiorari.

DIE DEUTSCHE BANK FILIALE NURNBERG,
a Corporation,
By AMOS J. PEASLEE
Counsel for the Petitioner.

STATE OF NEW YORK }
County of New York } ss:

AMOS J. PEASLEE, being duly sworn, says that he is counsel for the Deutsche Bank Filiale Nurnberg, petitioner, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

AMOS J. PEASLEE

Sworn to and subscribed before me this 1st day of October, 1925.

MARY V. EVERETT

[SEAL] Notary Public, New York County

Co. Clerk's No. 107 Reg. No. 7058

Commission expires March 30, 1927

To the

SUPREME COURT OF THE UNITED STATES

The petition of Die Deutsche Bank Filiale Nurnberg, a Corporation, for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit to bring before the Supreme Court the case of

Charles Franklin Humphrey,
Plaintiff-Appellee

against

Thomas W. Miller as Alien Property Custodian for the United States of America, Frank White as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg, a Corporation,
Defendants-Appellants

October Term, 1925.
No.

BRIEF IN SUPPORT OF PETITION.

(1) *The Circuit Court of Appeals erred in holding that the date of default rather than the date of judgment controlled the time for computation of the rate of exchange in converting the German marks into dollars.*

Circuit Judge Rudkin said at the beginning of his opinion in the District Court (R. 27):

> "Owing to the fluctuations and changes in the value of foreign exchange during and following the war, one

of the questions involved in this case becomes of the utmost importance *and can only be settled authoritatively by the court of the last resort.* Other questions are not free from difficulty, but my conclusions are as follows: * * *"

In view of the fact that this important question of law is before this Court in two other cases, to-wit, the case of *Guinness et al.* v. *Hicks et al.*, Nos. 80 and 81 on the Calendar of the October Term, 1925 (opinions below in 291 Fed. 768 and 299 Fed. 538), and the case of *Zimmermann et al.* v. *Hicks et al.*, Nos. 629 and 630, on the Calendar of the October Term, 1925, it is, presumably, not desirable to attempt to present the pertinent arguments in extenso upon this application.

The writ is requested in this case in order that the final decision here may be in accord with the final decisions of this Court in those cases and in order that execution may not in the meantime be levied.

For the purposes of this application it is perhaps sufficient to call attention to the fact that writs of certiorari were granted by this Court in the said case of *Guinness et al.* v. *Hicks et al.*, on June 9, 1924, 265 U. S. 579, to review exactly the same question which is here presented.

The decisions of the lower courts of the United States and of the courts of the various states on the question as to what rate of exchange should be applied in computing an indebtedness in foreign currency into United States currency are in hopeless conflict, and the question involved has never been squarely presented to this Court.

Some of the decisions favoring the rule that the rate of exchange prevailing at the date of judgment should apply, are:

Taan v. *Le Gaux* (1793), 1 Yeates (Pa.), 204.
Smith v. *Shaw* (1808), 2 Wash. C. C. 167 (Fed. Cas. No. 13170).
Grant et al., v. *Healey* (1829), Fed. Cas. No. 5696.
Marbury v. *Marbury*, 26 Md. 8.

Hawes v. *Woolcock*, 26 Wis. 629.
Scott v. *Hornsby*, 1 Call. (Va.) 35.
The Hurona, 268 Fed. 910.
Liberty National Bank of N. Y. v. *Burr*, 270 Fed. 251.
Manners v. *Pearson* (1898), 1 Ch. Div. 581.
Metcalf Co., Lim. v. *Mayer*, App. Div. (N. Y.) , *New York Law Journal*, October 2, 1925.

Some of the decisions favoring the rule that the rate of exchange prevailing on the date when the cause of action accrued, should apply, are:

Owners of S. S. Celia v. *Owners of S. S. Volturno* (1921), L. R. 2 App. Cas. 544.
Page v. *Levenson*, 281 Fed. 555.
Hoppe v. *The Russo-Asiatic Bank*, 235 N. Y. 37.
Simonoff v. *Bank* (1917), 279 Ill. 248.
Rasst v. *Morris* (1919), 135 Md. 243.
Katcher v. *American Express Co.* (1920), 94 N. J. Law 165.

The nearest approach to a consideration of the question by this Court is found in the case of *Birge-Forbes Co.* v. *Heye*, 251 U. S. 317, in which it was held that *in the absence of any evidence* as to the value of the German mark at any particular time, the "par" value of the mark was to be taken as the basis for computing the mark indebtedness in United States currency. In the instant suit evidence appears of the value of the German mark in terms of United States currency on all of the various pertinent dates (R. 42, 43, 77 and 78).

(2) *The Circuit Court of Appeals erred in holding that there was sufficient evidence of a demand on the bank to place it in default and also erred in allowing the pre-war rate of*

exchange even as to other deposits made at a later time and as to which there is no evidence whatever that there ever was any demand for the sums prior to the institution of the suit.

The Circuit Court of Appeals found that a demand was made by the plaintiff on the bank for the balance of the account on June 12, 1915 (R. 67). Without going into the details of the evidence on this application, it seems certain that no proper demand was ever made at any time of a character which would place a bank in default toward a depositor. *National Bank* v. *Millard*, 10 Wall. 152, at 155.

It also appears, however, that certain of the amounts comprised within the judgment were deposited at a later date (R. 56-67), and as to those items there is no evidence of any demand whatever prior to the institution of the suit.

It is elementary that a bank is not in default to its depositors until demand has been made upon it.

Leather Manufacturers Bank v. *Merchants Bank*, 128 U. S. 26.

Continental, etc., Bank v. *Chicago, etc., Company*, 229 U. S. 435, at 447.

U. S. Shipping Board E. F. Corporation v. *Atlantic Corporation*, 5 Fed. (2nd) 529.

Viets v. *Union National Bank of Troy*, 101 N. Y. 563.

Arnold v. *San Ramon Bank*, 184 Cal. 632.

Castalian v. *National City Bank of Chelsea*, 244 Mass. 416.

In the case of *Zimmermann et al.* v. *Hicks et al.*, decided by the Circuit Court of Appeals for the Second Circuit on May 4, 1925, (now before the Supreme Court as *Zimmermann et al.* v. *Hicks et al.*, Nos. 629 and 630 on the October 1925 Calendar) the Circuit Court of Appeals for the Second Circuit in an opinion written by Judge Hough, even though it adopted the "breach date theory" for computing the rate of exchange, held that there could be no default on the part of

a bank until a demand actually occurred, and applied the rate of exchange for German marks existing in December 1921, when the first demand appeared in that case.

The Court below clearly erred in this respect in the case at bar and its decision should be brought into harmony with the final word of this Court in the cases now pending before it.

Respectfully submitted,

AMOS J. PEASLEE,
Of Counsel for the Petitioner.

(15)

Supreme Court, U. S.
FILED
OCT 30 1925
WM. R. STANSBURY
Clerk

No. [redacted]

In the Supreme Court of the United States

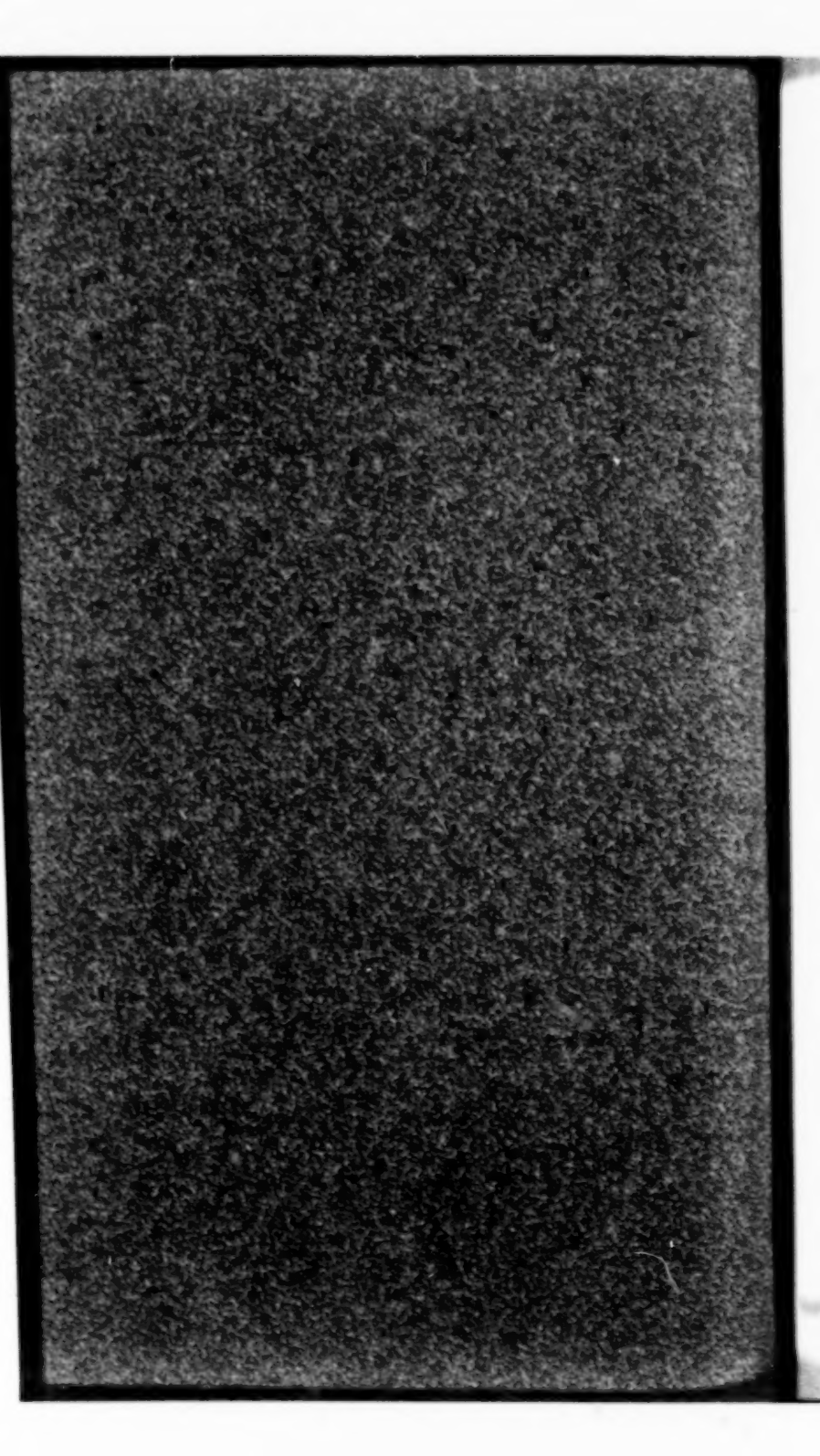
October Term, 1925

FRANK W. MILLER, as Alien Property Custodian, Plaintiff, Appellant, vs. THE UNION TRUST CO. OF MARYLAND, and THE DEUTSCHE BANK BERLIN, Defendants, Appellees.

Appellant's Petition for Rehearing

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Washington, D. C., October 30, 1925.



In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 764

THOMAS W. MILLER, as ALIEN PROPERTY CUSTODIAN; FRANK WHITE, as Treasurer of the United States of America; and Die Deutsche Bank Filiale, Nurnberg, Petitioners

v.

CHARLES FRANKLIN HUMPHREY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINDER IN PETITION

The Solicitor General, on behalf of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, joins in the petition of Die Deutsche Bank Filiale, Nurnberg, that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Ninth Circuit, rendered August 3, 1925, which affirmed a decree of the United States District Court for the Northern District of California against Thomas W. Miller, as Alien

Property Custodian, and Frank White, as Treasurer of the United States.

The main question in this case is whether the rate of exchange at the date the obligation became due or the rate at the date of the entry of the decree controls. This question was involved in the case of *Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United States, v. Benjamin Guinness et al.*, No. 80 on the October Term, 1925, calendar of this Court, which was argued and submitted on October 22d and 23d last. The decision in the *Guinness case*, No. 80, is expected to dispose of that question.

The decision of the United States Circuit Court of Appeals in the present case would become final November 2, 1925, were it not for the filing of this petition for certiorari, and the purpose of the Alien Property Custodian and the Treasurer of the United States in joining in this petition is to prevent the decision of the Circuit Court of Appeals from becoming final prior to the decision in the *Guinness case*.

This case also presents a question of fact as to the date on which the obligation matured, depending on whether a demand was made. This question has been resolved against the petitioners by the District Court and the Circuit Court of Appeals, and the Alien Property Custodian and the Treasurer of the United States are not disposed

to urge this Court on certiorari to review that finding; and so far as they are concerned decision of the petition for writ of certiorari may well be deferred until the decision in the *Guinness case* is rendered, with a view to the denial of this petition if the *Guinness case* is affirmed.

From the petition and brief on behalf of the Die Deutsche Bank Filiale, Nurnberg, it is apparent that the Die Deutsche Bank Filiale, Nurnberg, desires to have the Court review on writ of certiorari the finding of fact as to the date of demand or the fact of demand, even though the other question is resolved against it in the *Guinness case*.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1925.

○

FILED
FEB 23
WM. R. STAN

No. [redacted]224

In the Supreme Court of the United States

OCTOBER TERM, 1925

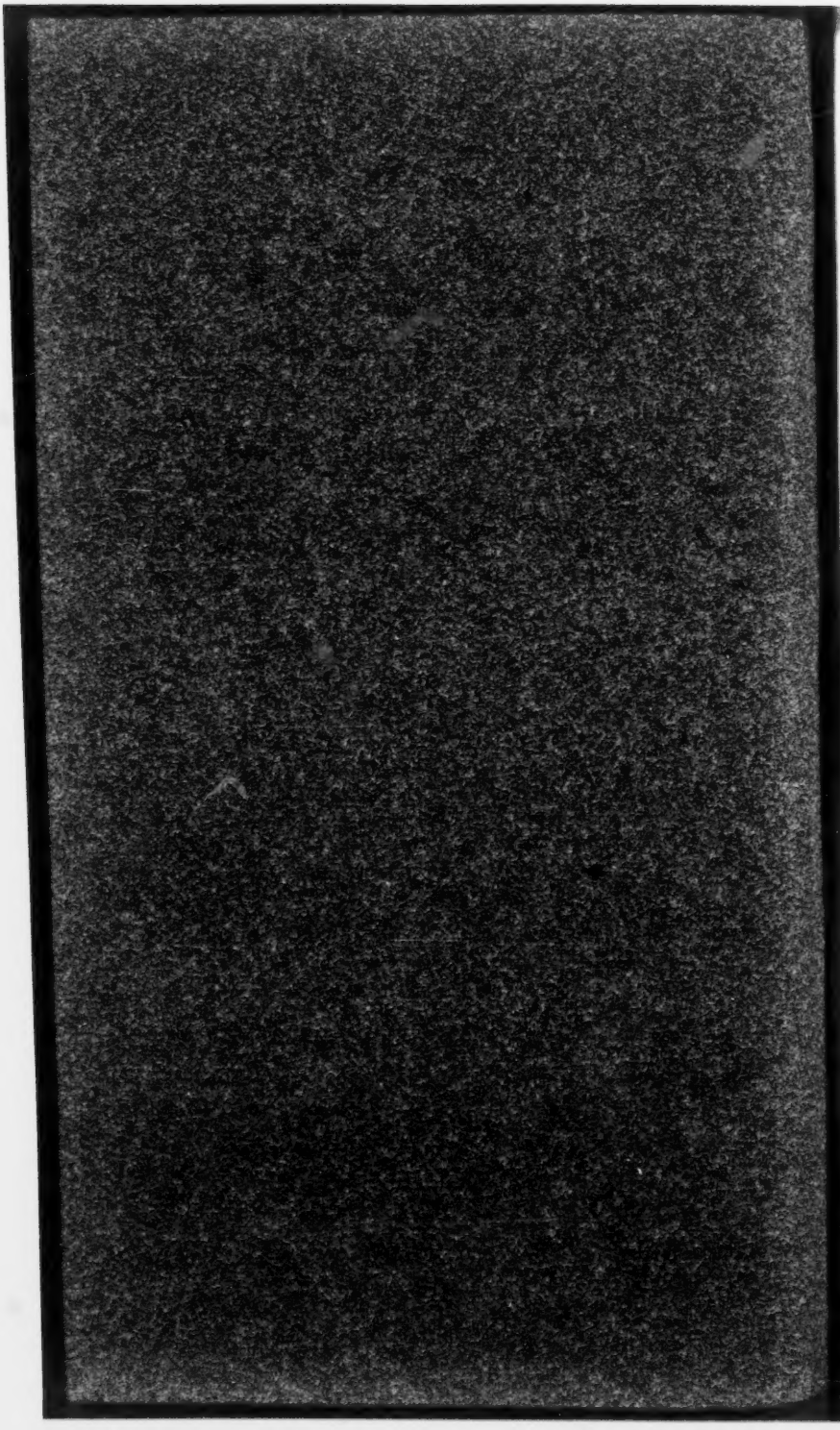
THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA; AND DER DEUTSCHE BANK FILIALE, PETITIONERS

v.

CHARLES FRANKLIN HUMPHREY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ALIEN PROPERTY CUSTODIAN AND THE TREASURER OF THE UNITED STATES ON THE MOTION OF THE RESPONDENT TO DISMISS OR AFFIRM



In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 764

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK WHITE, as Treasurer of the United States of America; and Die Deutsche Bank Filiale, Nurnberg, Petitioners

v.

CHARLES FRANKLIN HUMPHREY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ALIEN PROPERTY CUSTODIAN AND THE TREASURER OF THE UNITED STATES ON THE MOTION OF THE RESPONDENT TO DISMISS OR AFFIRM

The Alien Property Custodian and the Treasurer of the United States joined with Die Deutsche Bank in the petition for writ of certiorari.

On the assumption that the main question in this case was the same as that involved in the case of *Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United*

States v. *Benjamin Guinness et al.*, No. 80 on the October Term, 1925, calendar of this Court, and that the decision in the *Guinness case* would definitely dispose of this case, it was stated in the joinder in the petition for writ of certiorari that "decision on the petition for writ of certiorari may well be deferred until the decision in the *Guinness case* is rendered, with a view to the denial of this petition if the *Guinness case* is affirmed."

The opinion in No. 80, the *Guinness case*, was handed down November 16, 1925. A motion has now been made by the respondent, Humphrey, to dismiss or affirm on the authority of the decision in the *Guinness case*.

Die Deutsche Bank is resisting this motion on the ground that there is a distinction between this case and the *Guinness case*, and it points to the fact that the petition for writ of certiorari in this case was granted by the Court November 23, 1925, one week after the decision of the *Guinness case*. It is also contended by Die Deutsche Bank that one of the grounds for the decision in the *Guinness case* was that the debt was payable in the United States, because the creditor resided here, and there was nothing in the record to show that the debt had been made payable elsewhere; while in the present case the contention is that the debt was payable in Germany, because it was based on a deposit in a bank subject to checks payable at the Bank. If this furnishes a basis for distinguishing the cases, the motion to dismiss or affirm should be denied.

The Court does not need any argument as to what it intended to hold in the *Guinness case* or as to the basis for that decision.

If there be no distinction between the *Guinness case* and this, based on any alleged difference in the place of payment, the Alien Property Custodian and the Treasurer of the United States consent that, in so far as they are concerned, the writ of certiorari may be dismissed, and the mandate issued forthwith.

There is a question of fact in the case as to the date of demand upon Die Deutsche Bank, but both the District Court and the Circuit Court of Appeals found that the demand was made prior to the war and we are not disposed to ask this Court to review such a finding.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1926.

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Office Supreme Court
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WM. R. STANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]224

THE PETITION OF CHARLES FRANKLIN HUMPHREY, FOR AN ORDER AFFIRMING THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT (7 FED. REP. 2D ED. P. 330) OR ELSE DISMISSING THE WRIT OF CERTIORARI GRANTED AT THE OCTOBER TERM, 1925, AT THE INSTANCE OF APPELLANT-DEFENDANT, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner, Plaintiff-Appellee,

vs.

THOMAS W. MILLER, AS ALIEN PPOPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA, FRANK WHITE, AS TREASURER OF [THE UNITED STATES OF AMERICA, AND DIE DEUTSCHE BANK FILIALE NURNBERG (A CORPORATION),
Defendants-Appellants.

PAPERS IN OPPOSITION TO MOTION FOR AN ORDER AFFIRMING THE DECISION OR DISMISSING THE WRIT OF CERTIORARI.

AMOS J. PEASLEE,
Solicitor for DIE DEUTSCHE BANK
FILIALE NURNBERG.

The Evening Post Job Printing Office, Inc., 134 Fulton St., New York, N. Y.

IN THE

Supreme Court of the United States.

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

October Term, 1925.
No. 764.

PAPERS IN OPPOSITION TO MOTION FOR AN ORDER AFFIRMING THE DECISION OR DISMISSING THE WRIT OF CERTIORARI.

The defendant-appellant, Die Deutsche Bank Filiale Nurnberg opposes this motion to affirm the decision of the Circuit Court of Appeals for the Ninth Circuit or dismiss the Writ of Certiorari on the following grounds:

(1) The petition for a writ of certiorari in this case was granted on November 23, 1925, *one week after* the decision

of this court in the case of *Guinness et al.* vs. *Hicks et al.*, 70 L. Ed. p. 79, on which decision the petitioner now relies as determinative of the issues involved in the case at bar. It is not to be presumed that this court acted either in ignorance or disregard of a decision which it had previously handed down.

(2) Neither the decision in *Guinness et al.* v. *Hicks et al.*, nor the other decisions referred to in the moving-papers, determine the issues of law which are presented by the record in the case at bar.

The decision in the *Guinness* case, as was clearly pointed out in the opinion of Mr. Justice Holmes, applies to a situation where the debt "was to be paid *in the United States*". The decision proceeds on the theory that "the American firm had a claim *here*, not for the debt, but, at its option, for damages in dollars".

Exactly the contrary state of facts appears in the record in the case at bar. The cause of action did not arise in the United States. It arose abroad and this defendant desires at least to have an opportunity to present its views to the court at the proper time on this important phase of the legal problems involved.

Other extremely important questions of law which were left untouched by the decision in *Guinness et al.* v. *Hicks et al.* arise by reason of the provisions of the Treaty of Versailles and the Treaty of Berlin. Those questions must ultimately be passed upon by this court either upon the basis of the record in the case at bar or the record in the case of *Zimmermann et al.* v. *Hicks et al.*, Nos. 629 and 630, on the calendar of the October, 1925 Term of this Court.

Furthermore the record in the *Guinness* case consisted of a very brief and unsatisfactory stipulation as to the facts. It left in the realm of surmise and conjecture many important questions which must ultimately be authoritatively determined before the law applicable to the large group of cases pending in the lower courts involving the rate of ex-

change applicable to German mark obligations, will be finally determined. The record in the case at bar and the record in the case of *Zimmermann et al.* v. *Hicks et al.*, both set forth the proceedings at actual trials—not mere stipulations of fact—and raise important points which should be considered.

In the case of *Guinness et al.* v. *Hicks et al.* it did not even appear in the record that the relation of the parties was that of a banker to its depositors. In the case at bar and in the case of *Zimmermann et al. v. Hicks et al.*, that fact does appear. Very different legal results may follow.

In so far as the review of this case relates to the effect of the alleged demand by Humphrey upon the Bank, the Bank is not attacking any concurrent findings of fact of the lower courts. It is raising issues of law as to whether those facts, particularly since they involve transactions in a foreign country in terms of foreign currency, were sufficient to place the Bank in default toward its depositors. That question is not determined by any of the cases referred to by the petitioner, and it is a very important one.

The decision of the Circuit Court of Appeals for the Second Circuit in *Zimmermann et al.* v. *Hicks et al.*, 7 F. (2d.) 413, was in favor of the foreign bank. That court applied, not the pre-war rate of exchange, but the rate existing in December, 1921.

It would seem quite unfair to this defendant-appellant to have this writ of certiorari, which was heretofore granted by the court in the full light of its decision in *Guinness et al.* v. *Hicks et al.*, now dismissed on the basis of this summary motion, without a full opportunity to the defendant-appellant to present its views on these important questions of law, which affect so many other cases which are as yet undetermined.

It is not deemed necessary to discuss at this time the merits of the case or the other points raised in the brief for the petitioner, because the reasons for applying for the writ were fully set forth in the petition for the writ and brief in support thereof. A discussion of the full merits should, we

believe, be deferred until the case is reached in due course for hearing on the Court's calendar.

(3) This motion is made returnable on February 8th and the record in the case has not yet been printed. Annexed to the affidavit accompanying this statement and marked "Annex A" is a copy of a letter from the Clerk of the Court dated January 28, 1926, received by the solicitors for the defendant-appellant, indicating that the record will probably not be ready until about the middle of February. It is impossible at the present time, in view of this fact, for the defendant-appellant to submit a full memorandum relating to the issues raised by the record, with proper references to the record, since the page and folio numbers of the record are not yet known.

Dated February 5, 1926.

Respectfully submitted

AMOS J. PEASLEE
Solicitor for Die Deutsche Bank
Filiale Nurnberg

IN THE

SUPREME COURT OF THE UNITED STATES

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

October Term, 1925
No. 764

STATE OF NEW YORK }
County of New York } ss:

AMOS J. PEASLEE, being duly sworn, deposes and says:

1. I am the solicitor for the defendant-appellant Die Deutsche Bank Filiale Nurnberg.

2. The petition for a writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit was granted in this case on November 23, 1925.

3. The decision in the case of *Guinness et al.* v. *Hicks et al.* was handed down by this Court on November 16, 1925, prior to the granting of the application for a writ of certiorari in the case at bar.

4. The record in the case was forwarded to the Supreme Court, but I am informed and verily believe that the record has not yet been printed and will not be received from the printer until about the middle of February, 1926. The sources of my information and the grounds for my belief are the statements in a letter to my firm from the Clerk of the Supreme Court of the United States, dated January 28, 1926, a copy of which is annexed and marked "Annex A".

5. I have read the record in the case at bar, both with respect to the proceedings in the Circuit Court of Appeals and in the District Court. I also am counsel for the Deutsche Bank in the case of *Zimmermann et al.* v. *Hicks and the Deutsche Bank* which is now pending on the calendar of this court as Nos. 629 and 630 of the October Term, 1925, and I have read the record in that case. For the reasons outlined in the petition for the writ of certiorari in the case at bar and in the memorandum attached hereto, I am of the opinion that there are numerous questions of law raised both in the records in the case at bar and the case of *Zimmermann et al.* v. *Hicks et al.* which were not finally determined by the decision of this Court in the case of *Guinness et al* v. *Hicks et al.*, or by the other decisions referred to by the petitioner, and that it would be quite unfair to this defendant-appellant to dismiss the pending writ of certiorari on this summary motion without consideration of the record in the case, and without any proper opportunity for the defendant Bank to present its full views according to the procedure contemplated when the writ was granted.

AMOS J. PEASLEE

Sworn to before me this 5th day of February, 1926

MARY V. EVERETT

[SEAL] Notary Public, New York County

Co. Clerk's No. 107 Reg. No. 7058

Commission expires March 30, 1927

Annex A.

OFFICE OF THE CLERK,

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

JANUARY 28, 1926.

PEASLEE, BRIGHAM & GENNERT, Esqs.,
New York City.

DEAR SIRS:

Your letter of the 26th instant, in regard to the case of Humphrey *v.* Miller, No. 764, of the October Term, 1925, was received today. This record is now in the hands of the printer and he informs me that the record will be printed and ready for distribution by the middle of February.

You are correct in your understanding that the Court requires the printed record, on consideration of a motion to dismiss or affirm.

Yours truly,

WM. R. STANSBURY, Clerk
By H. B. W. Ass't

HW:LJ

Office Supreme Court,
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WM. R. STANS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 224

SUMMARY DOCKET NO. 224

DIE DEUTSCHE BANK FILIALE NURNBERG, AND THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

Petitioners

vs.

CHARLES FRANKLIN HUMPHREY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

AMOS J. PEASLEE
Counsel for DIE DEUTSCHE BANK FILIALE NURNBERG

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK, *et al.*,
Petitioners,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

Previous Decisions in the Case

The opinion of the Circuit Court of Appeals in this case is reported in 7 Fed. (2d) 330. The opinion of the District Court is not reported, but it is set forth in the record at page 16.

Jurisdiction

A writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit was granted on November 23, 1925 (R. 66) on the petition of Die Deutsche Bank Filiale Nurnberg in which the Alien Property Custodian and

the Treasurer of the United States joined (269 U. S. 547), to review a judgment of that court dated August 3, 1925 (R. 65), which affirmed a final decree of the Southern Division of the United States District Court for the Northern District of California, Second Division, dated April 8, 1924 (R. 17).

Statement of the Case

The suit was brought under section 9 of the Trading with the Enemy Act (40 Stat. at L. 411 and amendments) to recover from the funds in the possession of the Alien Property Custodian and the Treasurer of the United States a German mark debt from the Deutsche Bank to the plaintiff (who is the respondent here) upon a bank account maintained in Germany prior to the entry of the United States into the recent war.

The account was opened and maintained and *was payable in Germany* in terms of German marks (R. 21, 22; Exs. 1 and 2, R. 26; R. 37, 39, 42; Exs. 3-14, R. 27-32. *Bank of Yolo* v. *Sperry Co.*, 141 Cal. 314). German marks were at all of the times involved in the case lawful money of the German government (R. 24).

Suit was instituted on July 9, 1921 (R. 1), and judgment was entered on April 8, 1924, (R. 17) at which time the German mark was worth less than $.0137 (R. 46). The District Court awarded judgment for a sum in dollars equivalent to the German marks converted into dollars at the current rate of exchange existing on June 12, 1915, at which date the District Court found that a demand for payment had been made in Germany on the Bank by the plaintiff (R. 17).

The Point to be Reviewed

The writ of certiorari was requested, and a motion to dismiss the writ was opposed both by the Attorney General and by counsel for the Bank, in order that this Court may pass upon the question whether in the case of a *debt* created abroad in terms of a foreign currency and *payable abroad*, the judgment should convert the foreign money into dollars at a rate of exchange prevailing on the date of the judgment, or whether the rate should be taken as of the date of maturity. That question was expressly left open in the opinion of Mr. Justice Holmes in the case of *Guinness, et al.* v. *Hicks, et al.*, 269 U. S. 71, which dealt with an account payable *in the United States*, the opinion reading:

> * * * "The debt was due to an American creditor *and was to be paid in the United States.* When the contract was broken by a failure to pay, the American firm had a claim *here*, not for the debt, but, at its option, for *damages* in dollars. * * *".

The eleventh of the assignment of errors (R. 54) raises the question which is now presented to the Court.

Argument.

The suit in the case at bar is to collect a *specific debt*. It is an effort to enforce the collection of a loan of German marks which were *payable in Germany*. It is *not* an action to collect damages for breach of a contract, nor damages arising from a tort.

An action to collect a *debt* stands upon a peculiar footing. The only obligation which the Deutsche Bank ever assumed was to pay to Humphrey in Germany a liquidated amount of German marks. The sufficiency of the demand for payment which the plaintiff testifies that he made on June 12, 1915, is not questioned by the Deutsche Bank in this

brief. The default, however, occurred in Germany, and the right which the plaintiff six years later sought to enforce by suit in America was merely a right to collect a matured mark debt. It was not a right to collect *damages*. The *only* damages, other than nominal damages, that can in any case be recovered for the non-payment of a *liquidated debt*, are interest.

Damages should, in any event, never exceed the measure of liability in the jurisdiction where the liability arises. That is the law both in this country and in England and both the British and American courts have distinguished the case of a *debt payable abroad* from a suit to collect damages, in determining the rate of exchange applicable to the judgment.

If the suit had been brought in Germany all that Humphrey could have recovered was 39,922.05 German marks with interest. In such an action the fact that the purchasing power of the German mark had diminished between the date of maturity and the date of the judgment, would have been altogether irrelevant. The plaintiff cannot, by electing to sue in the United States instead of in Germany, enlarge the liability of the Deutsche Bank and compel it to pay a sum entirely different from that which the parties contemplated.

It is quite true that the German mark depreciated very much in value after June, 1915. But that depreciation is not a damage attributable to the failure of the Bank to make payment in 1915. Whatever rights the plaintiff has in respect to that depreciation are rights which do not arise out of his contract with the Deutsche Bank. They are rights *solely against the German Government*, and are collectible against the German Government through the medium of the Mixed Claims Commission, United States and Germany, which was appointed for the express purpose, *inter alia*, of passing upon such claims.

The function of this Court is to enforce the contract as the parties made it. Obviously, the most effective way to carry out the intention of the parties according to their con-

tract would be for the American Court to render its judgment in the currency in which the obligation was payable. Neither party could have any just ground for objection to such a judgment, because that would be in accordance with the terms of their agreement. A *procedural* rule prevents an American court from entering a judgment in terms of a foreign currency, but certainly *that should not cause the Court to alter the substantive rights of the parties.* Hence the judgment should direct the conversion of the marks into dollars on the date when the judgment is entered.

The corollaries which would follow from any other rule of law, sufficiently illustrate the importance of adhering to this rule. If the Court, in enforcing a foreign debt *payable abroad*, should take any rate of exchange other than the rate on the date of judgment, it would follow that although an offer by a debtor after maturity to pay the amount agreed upon with interest constitutes an effective tender if the debtor cannot be sued in any foreign jurisdiction, nevertheless, such an offer is not an effective tender if the debtor is suable elsewhere. How could the Court adopt a rule which would make *substantive rights between the parties vary entirely with the jurisdiction where the debtor happens to be suable?*

A creditor who voluntarily makes a loan in a foreign currency payable abroad has the right only to collect the debt according to the contract which he made. He has no right, merely because he sues in another jurisdiction, to collect what amounts to heavy *damages* in addition to interest, particularly if the damages sought are not attributable in any way to the default upon the debt.

POINT I.

In a suit to enforce the collection of a debt payable abroad in a foreign currency, the nearest approach towards effectuating the intention of the parties is to convert the foreign currency into dollars at the rate of exchange prevailing on the date of judgment.

In the case of a tort or a breach of an ordinary contract, a right of action for damages arises on the date of the commission of the tort or the date when the contract is broken. The *damages* collectible on such a right of action in an American court are naturally measured in terms of American dollars. The *dollars* become due on the date of the breach of duty.

But that is not what happens in the case of the maturity of a debt created in terms of a foreign currency and payable abroad. What the debtor becomes obligated to do on the date of maturity in such an instance is to repay the funds which he borrowed. *The intention of the parties at all times is that he shall repay that money—not something else.* If it happens that he can be sued in some other jurisdiction or jurisdictions where a judgment cannot be entered in terms of a foreign currency, that *procedural possibility* should not result in altering the contract of the parties, nor in the refusal of the courts in such jurisdictions, if suit be brought there, to give effect to the contract as nearly as can possibly be done.

If the creditor brings suit in the forum where the debt is payable, all that he is entitled to recover is the amount of his debt and interest. The sole question is whether the defendant owes the amount of the debt to the plaintiff. He can collect no *damages* because of the default. Can it be properly said that he is *damaged* merely because it happens that he can bring his suit in some other forum?

This court has repeatedly insisted that *damages* shall

never exceed the *measure of liability in the jurisdiction where the liability arises:*

Slater v. *Mexican National R. Co.*, 194 U. S. 120
Western Union Tel. Co. v. *Brown*, 234 U. S. 542.

The Court of Appeal of England has already dealt with the specific problem presented by the case at bar and has held that an action to enforce a *debt payable abroad* in a foreign currency is to be distinguished from an action for *damages* for breach of a contract or for a tort, and that in the *debt action* the date of maturity of the debt does *not* control the rate of exchange at which it is collectible in a British court. Hence the Court held that the payment—even long after maturity—of the exact amount of French francs due as a French debt payable in France, was a complete discharge of the debt, and that the creditor could not recover as damages an additional amount sufficient to give him the value of the franc at the rate of exchange prevailing on the date of default.

Societe des Hotels le Touquet Paris-Plage v. *Cummings* (1922 C. A.) 1 K. B. 451, reversing (1921) 3 K. B. 459.*

This view is also entertained by the leading text writers. Sutherland, in his work on "Damages" (4th Ed.), Vol. 1, sec. 213, says:

"Where the *debt* is not only payable in the currency of a foreign country, but is expressly or by implication *also*

*NOTE: This decision of the Court of Appeal of England was rendered after the House of Lords had held that the rate prevailing at the date of the breach of the obligation should control the case of a tort or ordinary contract. *S. S. Celia* v. *S. S. Volturno* (1921, H. L.) 2 A. C. 544. The British Courts had also previously held that the *judgment date* applies to a *debt payable abroad*. *Scott* v. *Bevan*, 2 B. & Ad. 78. It will be observed from a study of the British cases that the opinions of the courts draw a distinction between *debts payable abroad* and *damages* for breaches of contract or for torts.

Pilkington v. *Commissioners for Claims against France*, 2 Knaap P. C. 7, 19.
Lebaupin v. *Crispin* (1920) 2 K. B. 714.
Di Ferdinando v. *Simon* (1920, C. A.) 3 K. B. 409.
Cohen v. *Bouken* (1920, K. B.) 36 T. L. R. 767.

payable there, and not having been paid is sued in this country, the creditor is entitled in the money of the forum, to a sum equal to the value of the debt *at the place where it should have been paid.* * * * Hence he is entitled to recover according to the rate of exchange between the two countries *at the time of the trial.*"

Savigny, in his work on "Private International Law", (Guthrie's 2nd Ed.) p. 245, says:

* * * "For, if a sum of money is to be paid *at a place abroad*, * * * then the usage of language *at the place of fulfillment* must be taken as the rule. * * *"

Wharton, in his "Conflict of Laws" (3rd Ed.), Vol. 2, p. 861, says:

"* * * The *place of performance* * * * enters into the vitals of the obligation, so far as concerns its fulfillment. The obligor, who previously was at liberty in this respect, and if conditioned at all was conditioned only by the laws of his domicil, now *restricts himself to do a particular thing at a particular place. To this place, for this purpose, the intentions of both parties converge.*"

Story, in his "Conflict of Laws" (8th Ed.), pp. 425, 427, 428, says:

* * * "Where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country to recover for a breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained. * * * In all cases of this sort, *the place where the money is payable*, as well as the currency in which it is promised to be paid *are, as we shall presently see, material* ingredients." * * * But in all these cases *we are to take into consideration the place where the money is, by the original contract, payable;* for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it to that country. * * * This distinction may perhaps reconcile some of the cases between which there might seem, at first view, to be an apparent contrariety."

Lord Phillimore, in his "Commentaries on International Law" (3rd Ed.), Vol. 4, p. 648, says:

> "The fifth system, therefore, is the right one; it causes the law of the *place of fulfilment to prevail when that place is indicated.* * * * According to the Roman Law, the debtor must make an offer (*oblatio*) of capital and interest *at the place appointed for* payment; this, if refused, was followed by a solemn act of depositing the sum, by a sealing up (*obsignatio*) either *apud aedem sacram* or *in tuto loco*, and by the discharge of the obligation."

The decisions of the Federal Courts of the United States are in accord with the British doctrine and the doctrine of these text writers. The distinction is brought out sharply in the opinions of Judge Augustus Hand of the Southern District of New York in two decisions rendered the same day in the cases of *The Verdi*, 268 Fed. 908, and *The Hurona*, 268 Fed. 910. He applied the *judgment date in computing the rate of exchange respecting an obligation payable in France, and the breach date in computing the amount of an obligation arising in this country.* In *The Hurona*, Judge Hand, in applying the judgment date, said:

> "I think there can be no doubt that the amount due from the vessel to the libellant *was payable in France*, where the advances were made and the services rendered. Consequently this case differs, in my opinion, from that of *Thomas Wilson Sons & Co. Ltd.*, v. *Steamship Verdi*, 268 Fed. 908, in which I am this day handing down an opinion.
>
> "The only obligation of the vessel was to pay 119,007.65 francs *in France;* so long as this is performed, and that number of francs, plus interest, is paid to libellant, its claims are fully satisfied, and it is completely indemnified."

In the *Verdi* on the other hand, Judge Hand, in applying the "breach date" principle, said:

> "*This is not, therefore, a case of pounds sterling due in England,* suit to recover which is brought in New

York. The *damages* were payable in dollars here, and while the parties have agreed upon the measure of damages in pounds sterling, a portion of which were expended in England, that is a mere method of computing the *damages suffered in New York* and finally ascertainable on January 1, 1916."

In *Liberty National Bank* v. *Burr*, 270 Fed. 251, the Court applied the *judgment date* with respect to a debt *which was payable abroad*, saying:

> • • • "The case concerns itself with bills of exchange drawn and accepted in London and *made payable there.* • • • A promise to pay a sum of money, expressed in the terms of any money of account, is kept by payment in that money. Putting the same thought in the concrete, a man who promises to pay £1,000 sterling keeps his promise if he pays £1,000 sterling at the maturity of the note or other obligation which he has given, and *although he does not keep his promise to pay the note at maturity, if he pays it at a later date, he none the less meets his obligation if he later pays the £1,000, with interest thereon for the delay.*"

The following decisions are to the same effect:

Grant v. *Healey*, 3 Summ. 523 (opinion of Mr. Justice Story);
Marburg v. *Marburg*, 26 Md. 8;
Scott v. *Hornsby*, 5 Va. 41;
Lee v. *Wilcocks*, 5 Serg. & Rawle 48.

This Court has already recognized in the recent case of *Sutherland* v. *Mayer, et al.*, (Advance Sheets, June 15, 1926) that the extraordinary depreciation of the German mark was caused by forces entirely beyond the control of the German private debtors.

As this Court well knows, a Mixed Claims Commission was established by an agreement between the United States and Germany, dated August 10, 1922, for the adjudication of

all claims of American nationals against Germany. The agreement of August 10, 1922 expressly provides:

> "The United States of America and Germany being desirous of determining the amount *to be paid by Germany* in satisfaction of *Germany's* financial obligations under the treaty * * * have resolved to submit the questions for decision to a mixed commission.
>
> Article 1. The Commission shall pass upon the following categories of claims * * *.
>
> 3. Debts owing to American citizens by the German Government or by German nationals."

The two governments, by diplomatic agreement approved by the Commission, have already provided for the payment *by the German Government* of substantially the full pre-war value of the mark as *compensation* to American creditors who sustained losses through the mark's depreciation. A copy of this agreement dated February 25, 1925, is annexed hereto and is marked "Appendix I".

The claim of the plaintiff in the case at bar has been filed with the Mixed Claims Commission for the same sum which he claims in this suit (R. 40-44).

The plaintiff's claim, in so far as it is a claim for *damages*, can and will be allowed in the proceedings before the Mixed Claims Commission.

This *Court*, however, should adhere to, and should apply, the sound principles of law which have heretofore been accepted respecting the collection in this country of debts payable abroad in terms of a foreign currency, *and should render a judgment for as nearly as possible the exact equivalent of what the plaintiff would have recovered if he had brought his suit where the debt was payable.*

Conclusion.

We respectfully submit, therefore, that this Court should enforce the collection of the German mark *debt* as nearly as can possibly be done in accordance with the contract of the parties and in accordance with the manner in which it would have been enforced if suit had been brought in Germany. This can only be accomplished by converting the liquidated number of marks into dollars on the date of the judgment.

Since the suit is to enforce the collection of a *debt*, the creditor is not entitled to any *damages*. All that he is entitled to receive under the Court's judgment is the amount owed, plus interest.

The liability of the debtor measured with relation to the liability at the place where the debt *was payable* is merely to pay German marks. The liability should not be increased merely because he can bring a suit in another jurisdiction.

Respectfully submitted,

AMOS J. PEASLEE
Counsel for the defendant Die Deutsche Bank Filiale Nurnberg.

Appendix 1.

Agreement of February 25, 1925, between the United States and Germany relating to compensation by the German Government for depreciation of the German mark.

BERLIN, GERMANY,
August 19, 1924.

The Honorable
ROBERT W. BONYNGE,
Agent of the United States
before the Mixed Claims Commission,
United States and Germany,
Washington, D. C.

SIR:

Reference is made to the class of claims against the Government of Germany included in the list of claims that have been notified to the Commission and to the German Agent that embrace (1) the Mark balances carried in German banks in favor of American nationals, and (2) private debts owing in Marks from German nationals to American nationals, with respect to which two classes of claims the principal sum involved has not been paid over to the German Treuhander in accordance with exceptional war legislation enacted by the Government of Germany.

As I understand your position in regard to claims of these two classes, it is, briefly, that the American claimant under the Treaty of Berlin is entitled to recover the principal sum involved at the pre-war rate of exchange, together with interest thereon as you contend is provided for in the Treaty.

As you know, the position of my Government in respect to claims of this particular class may, I believe, be stated briefly as follows:

The American claimant is only entitled to a recovery other than in Marks in those cases where the principal sum involved was affected by the exceptional war legislation. In

such case recovery may be had based on the difference between the value of the Mark as of the date affected and the value as of the date of the repeal of the exceptional war legislation. Interest on this principal sum should also, according to the contention of my Government, be suspended during the period that the United States was at war with the Government of Germany.

As it will, in my opinion, unquestionably be of material advantage to both Governments to arrange for a settlement of the many difficult and intricate questions involved, I have the honor to submit, with the approval of my Government, a proposition in the nature of a compromise covering a general settlement of the principles governing these particular claims. This proposition, my Government feels, should be submitted in order that an amicable adjustment may be reached that will be fair, just and equitable to the two Governments and their nationals concerned, and that a speedy adjustment of the differences may be had.

With respect to Mark bank balances, I am authorized to say that I will consent to an award being entered whereby the American claimant may recover such balances on the basis of one Mark equals 16 cents; the balances in general in such claims to be stated as of April 6, 1917, or as near such date as may be convenient and practicable, the balance as of the date stated to be increased or diminished by appropriate credits or debits arising out of changes in the account during the period of belligerency as defined in the Commission's Administrative Decision No. 1. The balance as thus stated to bear interest at the rate of 5 per cent from January 1, 1920, until date of payment.

I am also authorized to say that a settlement of the Mark debts owing from German nationals to American nationals will be made on the same general basis, namely, that an award may be entered whereby the principal Mark sum involved will be valued on the basis of one Mark equals 16 cents. Where the debt became due and owing prior to April 6, 1917, such debt to be stated as of April 6, 1917, including

interest thereon at the rate agreed upon between the parties, or in the event of no express agreement, then at the rate provided for in accordance with custom and practice in good business dealings. Where the debt fell due during the period of belligerency as defined in Administrative Decision No. 1, then the debt to be stated as of its due date. The awards thus arrived at are to bear interest at the rate of 5 per cent from January 1, 1920, until paid.

It will be understood that this offer of compromise does not embrace claims involving bank deposits or private debts that may have been satified under the legislation of the Government of Germany by the German national paying the amounts involved directly to the Treuhander. In all such cases an award may be entered whereby recovery may be had of the amount involved on the basis of one Mark equals 17.4 cents; such award to bear interest at the rate of 5 per cent from date of payment to the Treuhander to the date of final payment of the award by the Government of Germany.

This offer of compromise is submitted with the understanding that as a condition precedent to an award in favor of the United States on behalf of one of its nationals, such national is to be required by the Government of the United States to execute a formal waiver of any rights he may consider he has to proceed directly against the German national involved in the courts of either Government or under the provisions of the Trading with the Enemy Act approved October 6, 1917, and the amendments thereto.

It is my further understanding in case this offer of compromise is accepted by the Government of the United States that the awards in each case are to be made by the Mixed Claims Commission, United States and Germany, against the Government of Germany, such awards, however, to set out in appropriate detail the facts in relation to the debt between the nationals involved, including the amount thereof in Marks, and the due date arrived at in the manner above outlined.

It will, of course, be understood that in submitting this

offer of compromise I reserve the right to make whatever defenses may be appropriate in any particular claim other than such defenses as may involve the question of the rate of exchange or interest.

In submitting this offer of compromise my Government desires it to be understood that the offer in no way whatsoever is to be taken as affecting in any manner the question of the liability of the particular German national involved to the German Government.

I have the honor to be, sir,

Your obedient servant

KARL VON LEWINSKY
German Agent.

"The American Agent informed the Commission in a meeting on February 25, 1925, that in accordance with authority received from The Honorable The Secretary of State he is now authorized to accept and does accept on behalf of the United States of America the proposition of the German Agent of August 19th, 1924." (Extract from the minutes of the Mixed Claims Commission, United States and Germany, February 25, 1925.)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. [redacted] 224

SUMMARY DOCKET No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG, AND THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

Petitioners,

vs.

CHARLES FRANKLIN HUMPHREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

ROGER J. WILLIAMS
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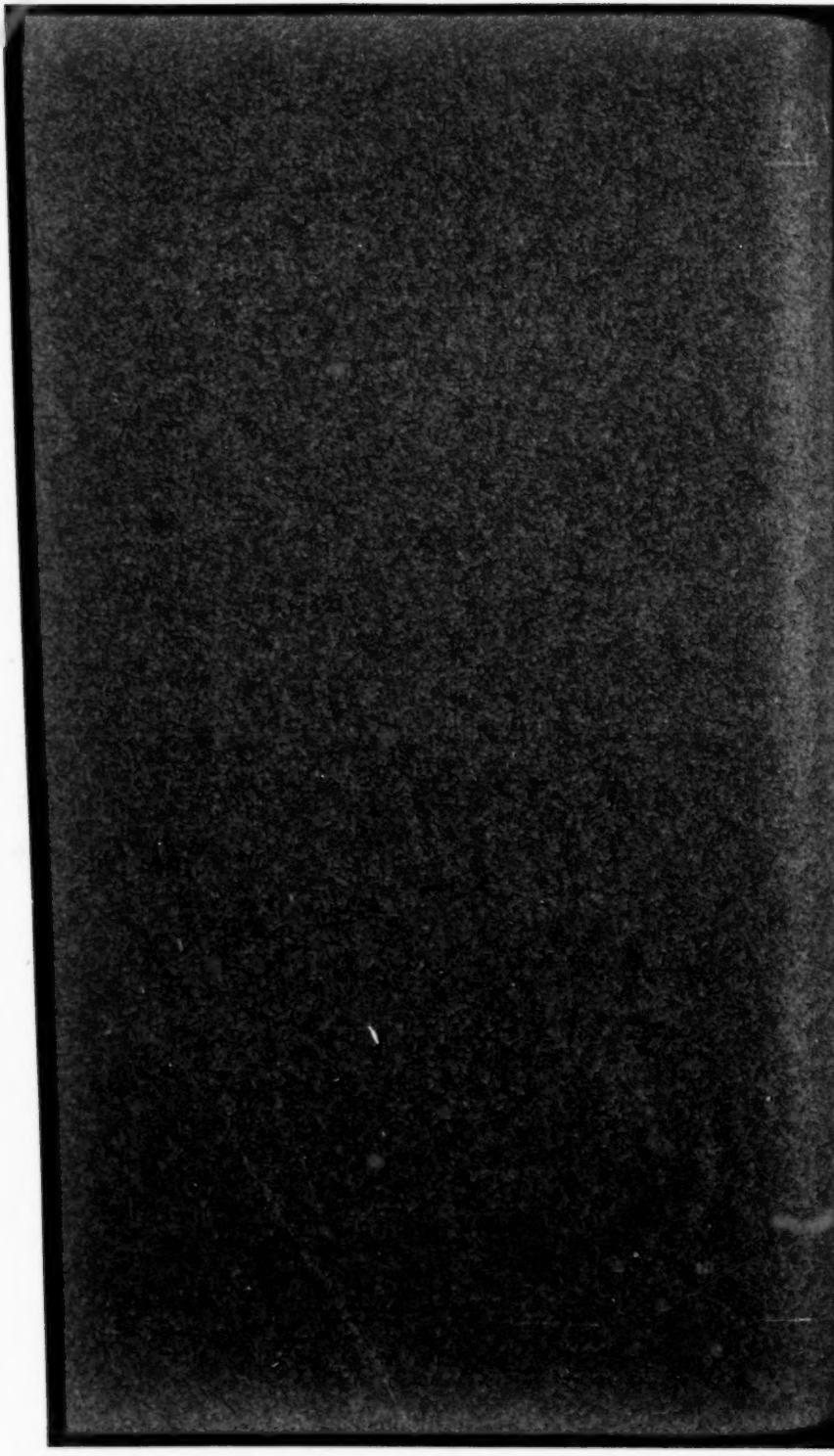
Filiale Nurnberg



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK, *et al.*,
Petitioners,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG.

The objection of the respondent that the assignments of error are not "sufficiently specific in detail or particularity", is without merit. Not only does the third assignment of error take exception to the entire computations of the District Court, but the fourth and eleventh assignments of error read specifically as follows (R. pp. 52, 54):

> "4. That said court erred in giving judgment in favor of the plaintiff and against the defendants in the sum of $11,440,275, which is for the sum of 55,468 marks, lawful money of Germany, converted from such German money into American dollars, lawful money of the United States of America (fol. 90) at the rate of exchange existing between such countries on the 12th day of June, 1915."
>
> "11. The said decree is against law in that it appears upon the face of said decree that the rate of exchange

adopted by the court for the conversion of German marks into dollars was the rate of exchange prevailing between the United States and Germany on the 12th day of June, 1915."

These assignments of error put the plaintiff fully upon notice that the Deutsche Bank objected to the computation of the rate of exchange upon the basis of the value of the mark on June 12, 1915. There is no rule of law which requires that the assignments of error shall set forth all the legal *reasons* which the litigant intends to advance in his final brief.

Upon the merits of the case the respondent's chief reliance is upon the cases of *Guinness, et al.*, vs. *Hicks*, 269 U. S. 71, and *Sutherland* vs. *Mayer*, 70 L. Ed. 781, advance sheets.

The opinion of Mr. Justice Holmes in the *Guinness case* (*supra*), as has already been pointed out in our principal brief (p. 3), makes it clear that the court's ruling in that case was intended to apply where, as the opinion states, "the debt was due to an American creditor *and was to be paid in the United States*". The theory of the court was that since the debt was payable in the United States an alternative right of action for "damages in dollars" arose immediately in the United States upon the breach of the contract.

The decision in the *Guinness case* (*supra*), however, is far distant from a holding that upon the default of every Japanese debtor who owes Yen *payable in Japan*, and that upon default of every Roumanian debtor who owes Lei *payable in Roumania*, and upon the default of every other debtor wherever he may be in the world *upon debts payable in his own country to citizens of his own country*, a right of action for dollars forthwith upon each such default arises in the United States.

In the case at bar the parties made their contract in Germany. The debt was solely one of German marks. The marks were repayable in Germany and neither of the parties ever at any time, so far as the record shows, had any thought

of any obligation in terms of American dollars until years after the alleged default occurred. As far as the record shows the Deutsche Bank had no property in the United States in June, 1915, and could not have been sued here at that time. The Trading with the Enemy Act, under which the suit is brought, was not passed until long after the time of the alleged default.

The case of *Sutherland* vs. *Mayer* (*supra*) was also entirely different upon its facts, because the court was there dealing with the dissolution of a partnership which had assets both in terms of German marks and in terms of American dollars, and where there were mutual rights and obligations in dollars as well as in marks.

It is obviously impossible to apply the theory that the date of breach "crystalizes" the rights of the parties, in such a way as to ignore other material and important features of the case which have a controlling bearing upon it. Even if we employ that phrase, the question remains *what right was it that was "crystallized" under the facts of the case at bar?*

It was a right solely to collect German marks in Germany. It was not a right to collect American dollars in the United States or in Germany or anywhere else. After maturtiy of the debt in Germany the right continued to be merely a right to collect German marks in Germany.

It was that right, *i. e.*, to collect 39,922.05 German marks and interest in Germany, which the plaintiff six years later in 1921 commenced to assert by suit in America. The test of the value of that right is its value at the place where the liability arose. Its value there was proved as a matter of fact to be 39,922.05 German marks on the day of entry of judgment, and the *procedural* possibility of bringing suit here, does not increase it. Our courts cannot properly say that the creditor's substantive rights are enlarged merely because he can get jurisdiction over his debtor in this country.

The decision of the British Court of Appeal in *Societe des Hotels le Touquet Paris-Plage* vs. *Cummings*, (1922 C. A.

1 K. B. 451), does hold exactly as we stated in our original brief (p. 7) that "the payment—even long after maturity—of the exact amount of French francs due as a French debt payable in France, was a complete discharge of the debt, and that the creditor could not recover as damages an additional amount sufficient to give him the value of the franc at the rate of exchange prevailing on the date of default". The Court of Kings Bench had held that such an additional sum could be recovered by way of damages, being under the impression that it was bound by the ruling of the House of Lords in the case of *S. S. Cecelia* vs. *S. S. Volturno* (1921 H. L.), 2. A. C. 544. The Court of Appeal, however, reversed the decision of the Court of Kings Bench and held that the ruling of the House of Lords in the *Cecelia case* was not applicable to the *Toquet case* since the *Toquet case* involved a mere debt in terms of foreign currency *and payable abroad*. The decision of the British Court of Appeal is entirely inconsistent with the principle which the respondent seeks to have the Court establish in the case at bar.

The final objection of the respondent that the court has no right to take judicial notice of two international agreements between the United States and Germany, to wit, the agreement of August 10, 1922, which created the Mixed Claims Commission, and the agreement of February 25, 1925, which settled the basis of payment by Germany of the damage claims for the depreciation of the German mark, is obviously without merit. This court has the right to take judicial notice of all such public treaties and international agreements.

The respondent in this case has two separate and distinct rights. He has one right which arose in Germany by a German contract through a German debt of German marks payable in Germany. He happens to be able to bring suit to enforce that right in America. The measure of his recovery in the American court should be the measure of the value of

the right in Germany and that value is 39,922.05 German marks and interest converted into dollars at the rate of exchange prevailing on April 8, 1924, when judgment was entered.

The respondent's other right is the right to collect damages against the German Government arising out of the depreciation of the German mark. That right is enforceable through the medium of the Mixed Claims Commission. It is a right with which this Court has nothing whatever to do.

Respectfully submitted,

AMOS J. PEASLEE,
Counsel for Die Deutsche Bank
Filiale Nurnberg.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG,
Petitioner

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent

MEMORANDUM OF DIE DEUTSCHE BANK FILIALE NURNBERG IN OPPOSITION TO RESPONDENT'S PETITION FOR A REHEARING

WITH

REPRINTS OF THE BANK'S BRIEFS

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IN THE

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The respondent's petition for a rehearing is couched in different language from that which he employed in his original brief, but (*a*) not a single authority is mentioned in the petition which was not cited in the briefs which were before the Court on the original hearing, (*b*) no statute or decision of this Court is mentioned which is in conflict with the decision made in this case, and (*c*) no constitutional point whatever is involved. It is respectfully submitted, therefore,

that under the settled doctrine of this Court the petition for a rehearing should be denied.

Shreveport vs. *Holmes*, 125 U. S. 694; 31 L Ed. 854;

Sioux City & St. P. R. Co. vs. *United States*, 160 U. S. 685; 40 L. Ed. 583;

Chapman, etc. vs. *Board of Directors St. Francis, etc.*, 234 U. S. 667; 58 L. Ed. 1526;

Lore vs. *Flahive*, 206 U. S. 356; 51 L. Ed. 1092.

The principle for which the respondent pleads, that by "comity" and "private international law" a creditor is entitled to sue his debtor wherever the debtor may be found (whether the action is called a "transitory" one or otherwise is immaterial), and that the Trading with the Enemy Act was a remedial measure authorizing the enforcement of such rights, is a principle which is not disputed—nor was it disputed at the time of the decision by the Court of this case. That principle, however, relates only to the question of jurisdiction.

The legal point which was at issue in the case was simply this: starting our reasoning from the elementary basis of Contract Law—what did the parties to this particular contract intend?

What were the basic considerations which led the courts, in the earliest development of the law of Debt, to say that in an action to recover a debt—whether it be a debt of marks or dollars or pounds sterling, or any other currency—no damages for delay in payment after the due date, other than interest on the debt, are to be allowed by a court of law, even though the collateral damage and inconvenience to the creditor as a result of the delay in payment may be very real and disastrous?

The answer to both questions is that when one party loans a sum of money to another, repayable in terms of that particular currency at a time and place when and where that currency is legal tender for the repayment of the debt, it is

the intention of the parties that the debt, whenever it actually is discharged—be that before or after the due date—may be discharged by the repayment of that currency, with interest, regardless of what the "index figures" of economists, or the foreign rates of exchange, may say as to the value of that currency in relation to something else.

Collateral damages arising from the delay in the payment of the debt, however real they may seem to the creditor, are not recoverable in a court of law. In the case of *London v. Taxing District of Shelby County*, 104 U. S. (14 Otto), 771; 26 L. Ed. 923, Mr. Chief Justice Waite, in delivering the opinion of the court said:

> "As to the first of these questions, it is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. *The law assumes that interest is the measure of all such damages.*"

It is this same basic principle which has caused the Court to establish the law that the measure of damages in any suit shall never exceed *the measure of liability in the jurisdiction where the liability arose.*

It is universally conceded that the American dollar in 1921 had a much lower purchasing power than it had in the year 1915. Would the respondent argue that an American debtor on a dollar debt payable to an American creditor in America which became due in 1915, is responsible in "damages" to his American creditor if the American creditor did not commence suit until 1921? The American creditor in such an instance can prove with equal force that he has been "damaged" by the delay in payment.

If the respondent's theory were sound that he is entitled to damages from the debtor on the facts of this particular case by reason of the depreciation of the German mark in value during the six years between 1915 and 1921, following the due date, during which he elected not to sue, then it would necessarily follow that a defaulting debtor is liable *for*

other collateral damages which the creditor may suffer by reason of the inconvenience of not having the money repaid on the due date. That, however, is not the law.

If we keep in mind (*a*) the elementary principle of law that a court's function is merely to carry out as nearly as possible the legal obligation which the parties undertook to assume, and (*b*) that the facts of this case related solely to a debt created between two persons in Germany in terms of German marks and repayable in Germany in the legal currency of that country—we may save ourselves the mental exercise, however stimulating it may be, of joining the respondent in his speculations as to what the Court may hold on different states of facts which may arise in other cases in the future. The Court would have little time for disposing of the concrete cases on its calendar if it should attempt to solve all the hypothetical controversies which may be suggested to it.

The problems of the mooted cases suggested by the respondent's petition, however, present to our mind no difficulties even if those hypothetical cases be considered. Of course the principle is one which works both ways. Why should it not? When debts are created in terms of a particular currency they are created presumably with the expectation of the parties that the currency may either increase or decrease in value with relation to other things. No system of money has yet been devised which is perfect in its stability. When a country selects some medium of exchange for a currency, it labels it with the term "money" for the very purpose of creating something in which parties may deal with the assurance that when they express their obligations in terms of that medium of exchange, the courts will carry out their intentions and obligations as so fixed.

All that the Court did in its decision in this case was to adhere to these simple principles and give effect as nearly as possibly could be done to the intention of the parties and to the laws and conditions under which the relations and obligations of the parties on this particular state of facts.

arose. Such a ruling makes the *substantive rights* of the parties fixed and determined, and prevents those substantive rights from varying according to the chance circumstance of the forum in which the suit happens to be brought.

In the *Legal Tender Cases*, 79 U. S. (12 Wall.) 457; 20 L. Ed. 287, Mr. Justice Strong, in delivering the opinion of the Court said:

> "Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender Treasury Notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectations of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt. * * *.
>
> * * * It is true that under the Acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. * * * No one ever doubted that a debt of $1,000, contracted before 1834 could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. * * * We have been asked

whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values."

Reprints of the original Brief and Reply Brief submitted on behalf of Die Deutsche Bank Filiale Nurnberg are attached hereto marked "Annex A" and "Annex B".

The petition for a rehearing should, therefore, be dismissed.

Respectfully submitted,

AMOS J. PEASLEE
Counsel for Die Deutsche Bank
Filiale Nurnberg

Dated, January 6th, 1927

Annex A

REPRINT OF BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG FILED ON ORIGINAL HEARING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG, AND THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE AS TREASURER OF THE UNITED STATES,

Petitioners

vs.

CHARLES FRANKLIN HUMPHREY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

AMOS J. PEASLEE

Counsel for DIE DEUTSCHE BANK FILIALE NURNBERG

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK, *et al.*,
Petitioners,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

Previous Decisions in the Case

The opinion of the Circuit Court of Appeals in this case is reported in 7 Fed. (2d) 328. The opinion of the District Court is not reported, but it is set forth in the record at page 16.

Jurisdiction

A writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit was granted on November 23, 1925 (R. 66) on the petition of Die Deutsche Bank Filiale Nurnberg in which the Alien Property Custodian and

the Treasurer of the United States joined (269 U. S. 547), to review a judgment of that court dated August 3, 1925 (R. 65), which affirmed a final decree of the Southern Division of the United States District Court for the Northern District of California, Second Division, dated April 8, 1924 (R. 17).

Statement of the Case

The suit was brought under section 9 of the Trading with the Enemy Act (40 Stat. at L. 411 and amendments) to recover from the funds in the possession of the Alien Property Custodian and the Treasurer of the United States a German mark debt from the Deutsche Bank to the plaintiff (who is the respondent here) upon a bank account maintained in Germany prior to the entry of the United States into the recent war.

The account was opened and maintained and *was payable in Germany* in terms of German marks (R. 21, 22; Exs. 1 and 2, R. 26; R. 37, 39, 42; Exs. 3-14, R. 27-32. *Bank of Yolo v. Sperry Co.*, 141 Cal. 314). German marks were at all of the times involved in the case lawful money of the German government (R. 24).

Suit was instituted on July 9, 1921 (R. 1), and judgment was entered on April 8, 1924, (R. 17) at which time the German mark was worth less than $.0137 (R. 46). The District Court awarded judgment for a sum in dollars equivalent to the German marks converted into dollars at the current rate of exchange existing on June 12, 1915, at which date the District Court found that a demand for payment had been made in Germany on the Bank by the plaintiff (R. 17).

The Point to be Reviewed

The writ of certiorari was requested, and a motion to dismiss the writ was opposed both by the Attorney General and by counsel for the Bank, in order that this Court may pass upon the question whether in the case of a *debt* created abroad in terms of a foreign currency and *payable abroad*, the judgment should convert the foreign money into dollars at a rate of exchange prevailing on the date of the judgment, or whether the rate should be taken as of the date of maturity. That question was expressly left open in the opinion of Mr. Justice Holmes in the case of *Guinness, et al. v. Hicks, et al.*, 269 U. S. 71, which dealt with an account payable *in the United States*, the opinion reading:

> * * * "The debt was due to an American creditor *and was to be paid in the United States.* When the contract was broken by a failure to pay, the American firm had a claim *here*, not for the debt, but, at its option, for *damages* in dollars. * * *".

The eleventh of the assignment of errors (R. 54) raises the question which is now presented to the Court.

Argument

The suit in the case at bar is to collect a *specific debt*. It is an effort to enforce the collection of a loan of German marks which were *payable in Germany*. It is *not* an action to collect damages for breach of a contract, nor damages arising from a tort.

An action to collect a *debt* stands upon a peculiar footing. The only obligation which the Deutsche Bank ever assumed was to pay to Humphrey in Germany a liquidated amount of German marks. The sufficiency of the demand for payment which the plaintiff testifies that he made on June 12, 1915, is not questioned by the Deutsche Bank in this

brief. The default, however, occurred in Germany, and the right which the plaintiff six years later sought to enforce by suit in America was merely a right to collect a matured mark debt. It was not a right to collect *damages*. The *only* damages, other than nominal damages, that can in any case be recovered for the non-payment of a *liquidated debt*, are interest.

Damages should, in any event, never exceed the measure of liability in the jurisdiction where the liability arises. That is the law both in this country and in England and both the British and American courts have distinguished the case of a *debt payable abroad* from a suit to collect damages, in determining the rate of exchange applicable to the judgment.

If the suit had been brought in Germany all that Humphrey could have recovered was 39,922.05 German marks with interest. In such an action the fact that the purchasing power of the German mark had diminished between the date of maturity and the date of the judgment, would have been altogether irrelevant. The plaintiff cannot, by electing to sue in the United States instead of in Germany, enlarge the liability of the Deutsche Bank and compel it to pay a sum entirely different from that which the parties contemplated.

It is quite true that the German mark depreciated very much in value after June, 1915. But that depreciation is not a damage attributable to the failure of the Bank to make payment in 1915. Whatever rights the plaintiff has in respect to that depreciation are rights which do not arise out of his contract with the Deutsche Bank. They are rights *solely against the German Government*, and are collectible against the German Government through the medium of the Mixed Claims Commission, United States and Germany, which was appointed for the express purpose, *inter alia*, of passing upon such claims.

The function of this Court is to enforce the contract as the parties made it. Obviously, the most effective way to carry out the intention of the parties according to their con-

tract would be for the American Court to render its judgment in the currency in which the obligation was payable. Neither party could have any just ground for objection to such a judgment, because that would be in accordance with the terms of their agreement. A *procedural* rule prevents an American court from entering a judgment in terms of a foreign currency, but certainly *that should not cause the Court to alter the substantive rights of the parties.* Hence the judgment should direct the conversion of the marks into dollars on the date when the judgment is entered.

The corollaries which would follow from any other rule of law, sufficiently illustrate the importance of adhering to this rule. If the Court, in enforcing a foreign debt *payable abroad*, should take any rate of exchange other than the rate on the date of judgment, it would follow that although an offer by a debtor after maturity to pay the amount agreed upon with interest constitutes an effective tender if the debtor cannot be sued in any foreign jurisdiction, nevertheless, such an offer is not an effective tender if the debtor is suable elsewhere. How could the Court adopt a rule which would make *substantive rights between the parties vary entirely with the jurisdiction where the debtor happens to be suable?*

A creditor who voluntarily makes a loan in a foreign currency payable abroad has the right only to collect the debt according to the contract which he made. He has no right, merely because he sues in another jurisdiction, to collect what amounts to heavy *damages* in addition to interest, particularly if the damages sought are not attributable in any way to the default upon the debt.

POINT I.

In a suit to enforce the collection of a debt payable abroad in a foreign currency, the nearest approach towards effectuating the intention of the parties is to convert the foreign currency into dollars at the rate of exchange prevailing on the date of judgment.

In the case of a tort or a breach of an ordinary contract, a right of action for damages arises on the date of the commission of the tort or the date when the contract is broken. The *damages* collectible on such a right of action in an American court are naturally measured in terms of American dollars. The *dollars* become due on the date of the breach of duty.

But that is not what happens in the case of the maturity of a debt created in terms of a foreign currency and payable abroad. What the debtor becomes obligated to do on the date of maturity in such an instance is to repay the funds which he borrowed. *The intention of the parties at all times is that he shall repay that money—not something else.* If it happens that he can be sued in some other jurisdiction or jurisdictions where a judgment cannot be entered in terms of a foreign currency, that *procedural possibility* should not result in altering the contract of the parties, nor in the refusal of the courts in such jurisdictions, if suit be brought there, to give effect to the contract as nearly as can possibly be done.

If the creditor brings suit in the forum where the debt is payable, all that he is entitled to recover is the amount of his debt and interest. The sole question is whether the defendant owes the amount of the debt to the plaintiff. He can collect no *damages* because of the default. Can it be properly said that he is *damaged* merely because it happens that he can bring his suit in some other forum?

This court has repeatedly insisted that *damages* shall

never exceed the *measure of liability in the jurisdiction where the liability arises:*

Slater v. Mexican National R. Co., 194 U. S. 120
Western Union Tel. Co. v. Brown, 234 U. S. 542.

The Court of Appeal of England has already dealt with the specific problem presented by the case at bar and has held that an action to enforce a *debt payable abroad* in a foreign currency is to be distinguished from an action for *damages* for breach of a contract or for a tort, and that in the *debt action* the date of maturity of the debt does *not* control the rate of exchange at which it is collectible in a British court. Hence the Court held that the payment—even long after maturity—of the exact amount of French francs due as a French debt payable in France, was a complete discharge of the debt, and that the creditor could not recover as damages an additional amount sufficient to give him the value of the franc at the rate of exchange prevailing on the date of default.

Societe des Hotels le Touquet Paris-Plage v. Cummings (1922 C. A.) 1 K. B. 451, reversing (1921) 3 K. B. 459.*

This view is also entertained by the leading text writers. Sutherland, in his work on "Damages" (4th Ed.), Vol. 1, Sec. 213, says:

"Where the *debt* is not only payable in the currency of a foreign country, but is expressly or by implication *also*

*Note: This decision of the Court of Appeal of England was rendered after the House of Lords had held that the rate prevailing at the date of the breach of the obligation should control the case of a tort or ordinary contract. *S. S. Celia v. S. S. Volturno* (1921, H. L.) 2 A. C. 544. The British Courts had also previously held that the *judgment date* applies to a *debt payable abroad*. *Scott v. Bevan*, 2 B. & Ald. 78. It will be observed from a study of the British cases that the opinions of the courts draw a distinction between *debts payable abroad* and *damages* for breaches of contract or for torts.

Pilkington v. Commissioners for Claims against France, 2 Knapp P. C. 7, 19.
Lebaupin v. Crispin (1920) 2 K. B. 714.
De Ferdinando v. Simon (1920, C. A.) 3 K. B. 409.
Cohen v. Benaim (1920), K. B.) 36 T. L. R. 767.

payable there, and not having been paid is sued in this country, the creditor is entitled in the money of the forum, to a sum equal to the value of the debt *at the place where it should have been paid.* * * * Hence he is entitled to recover according to the rate of exchange between the two countries *at the time of the trial.*"

Savigny, in his work on "Private International Law", (Guthrie's 2nd. Ed.) p. 245, says:

* * * "For, if a sum of money is to be paid *at a place abroad*, * * * then the usage of language *at the place of fulfillment* must be taken as the rule. * * *"

Wharton, in his "Conflict of Laws" (3rd. Ed.), Vol. 2, p. 861, says:

"* * * The *place of performance* * * * enters into the vitals of the obligation, so far as concerns its fulfillment. The obligor, who previously was at liberty in this respect, and if conditioned at all was conditioned only by the laws of his domicil, now *restricts himself to do a particular thing at a particular place. To this place, for this purpose, the intentions of both parties converge.*"

Story, in his "Conflict of Laws" (8th. Ed.), pp. 425, 427, 428, says:

* * * "Where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country to recover for a breach of the contract, a question often arises as to the manner in which the amount of the debt is to be ascertained. * * * In all cases of this sort, *the place where the money is payable*, as well as the currency in which it is promised to be paid *are, as we shall presently see, material* ingredients." * * * But in all these cases *we are to take into consideration the place where the money is, by the original contract, payable;* for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it to that country. * * * This distinction may perhaps reconcile some of the cases between which there might seem, at first view, to be an apparent contrariety."

Lord Phillimore, in his "Commentaries on International Law" (3rd. Ed.), Vol. 4, p. 648, says:

> "The fifth system, therefore, is the right one; it causes the law of the *place of fulfilment to prevail when that place is indicated.* * * * According to the Roman Law, the debtor must make an offer (*oblatio*) of capital and interest *at the place appointed for* payment; this, if refused, was followed by a solemn act of depositing the sum, by a sealing up (*obsignatio*) either *apud aedem sacram* or *in tuto loco*, and by the discharge of the obligation."

The decisions of the Federal Courts of the United States are in accord with the British doctrine and the doctrine of these text writers. The distinction is brought out sharply in the opinions of Judge Augustus Hand of the Southern District of New York in two decisions rendered the same day in the cases of *The Verdi*, 268 Fed. 908, and *The Hurona*, 268 Fed. 910. He applied the *judgment date in computing the rate of exchange respecting an obligation payable in France, and the breach date in computing the amount of an obligation arising in this country.* In *The Hurona*, Judge Hand, in applying the judgment date, said:

> "I think there can be no doubt that the amount due from the vessel to the libellant *was payable in France*, where the advances were made and the services rendered. Consequently this case differs, in my opinion, from that of *Thomas Wilson Sons & Co. Ltd.*, v. *Steamship Verdi*, 268 Fed. 908, in which I am this day handing down an opinion.
>
> "The only obligation of the vessel was to pay 119,607.65 francs *in France;* so long as this is performed, and that number of francs, plus interest, is paid to libellant, its claims are fully satisfied, and it is completely indemnified."

In the *Verdi* on the other hand, Judge Hand, in applying the "breach date" principle, said:

> "*This is not, therefore, a case of pounds sterling due in England*, suit to recover which is brought in New

> York. The *damages* were payable in dollars here, and while the parties have agreed upon the measure of damages in pounds sterling, a portion of which were expended in England, that is a mere method of computing the *damages suffered in New York* and finally ascertainable on January 1, 1916."

In *Liberty National Bank* v. *Burr*, 270 Fed. 251, the Court applied the *judgment date* with respect to a debt *which was payable abroad*, saying:

> * * * "The case concerns itself with bills of exchange drawn and accepted in London and *made payable there.* * * * A promise to pay a sum of money, expressed in the terms of any money of account, is kept by payment in that money. Putting the same thought in the concrete, a man who promises to pay £1,000 sterling keeps his promise if he pays £1,000 sterling at the maturity of the note or other obligation which he has given, and *although he does not keep his promise to pay the note at maturity, if he pays it at a later date, he none the less meets his obligation if he later pays the £1,000, with interest thereon for the delay.*"

The following decisions are to the same effect:

> *Grant* v. *Healey*, 3 Sumn. 523 (opinion of Mr. Justice Story);
> *Marburg* v. *Marburg*, 26 Md. 8;
> *Scott* v. *Hornsby*, 5 Va. 41;
> *Lee* v. *Wilcocks*, 5 Serg. & Rawle 48.

This Court has already recognized in the recent case of *Sutherland* v. *Mayer, et al.*, (Advance Sheets, June 15, 1926) that the extraordinary depreciation of the German mark was caused by forces entirely beyond the control of the German private debtors.

As this Court well knows, a Mixed Claims Commission was established by an agreement between the United States and Germany, dated August 10, 1922, for the adjudication of

all claims of American nationals against Germany. The agreement of August 10, 1922 expressly provides:

> "The United States of America and Germany being desirous of determining the amount *to be paid by Germany* in satisfaction of *Germany's* financial obligations under the treaty * * * have resolved to submit the questions for decision to a mixed commission.
>
> Article 1. The Commission shall pass upon the following categories of claims * * *.
>
> 3. Debts owing to American citizens by the German Government or by German nationals."

The two governments, by diplomatic agreement approved by the Commission, have already provided for the payment *by the German Government* of substantially the full pre-war value of the mark as *compensation* to American creditors who sustained losses through the mark's depreciation. A copy of this agreement dated February 25, 1925, is annexed hereto and is marked "Appendix I".

The claim of the plaintiff in the case at bar has been filed with the Mixed Claims Commission for the same sum which he claims in this suit. R. 40-44.

The plaintiff's claim, in so far as it is a claim for *damages*, can and will be allowed in the proceedings before the Mixed Claims Commission.

This Court, however, should adhere to, and should apply, the sound principles of law which have heretofore been accepted respecting the collection in this country of debts payable abroad in terms of a foreign currency, *and should render a judgment for as nearly as possible the exact equivalent of what the plaintiff would have recovered if he had brought his suit where the debt was payable.*

Conclusion

We respectfully submit, therefore, that this Court should enforce the collection of the German mark *debt* as nearly as can possibly be done in accordance with the contract of the parties and in accordance with the manner in which it would have been enforced if suit had been brought in Germany. This can only be accomplished by converting the liquidated number of marks into dollars on the date of the judgment.

Since the suit is to enforce the collection of a *debt*, the creditor is not entitled to any *damages*. All that he is entitled to receive under the Court's judgment is the amount owed, plus interest.

The liability of the debtor measured with relation to the liability at the place where the debt *was payable* is merely to pay German marks. The liability should not be increased merely because he can bring a suit in another jurisdiction.

Respectfully submitted,

AMOS J. PEASLEE
Counsel for the defendant Die Deutsche
Bank Filiale Nurnberg.

Appendix 1.

Agreement of February 25, 1925, between the United States and Germany relating to compensation by the German Government for depreciation of the German mark.

BERLIN, GERMANY,
August 19, 1924.

The Honorable
ROBERT W. BONYNGE,
Agent of the United States
before the Mixed Claims Commission,
United States and Germany,
Washington, D. C.

SIR:

Reference is made to the class of claims against the Government of Germany included in the list of claims that have been notified to the Commission and to the German Agent that embrace (1) the Mark balances carried in German banks in favor of American nationals, and (2) private debts owing in Marks from German nationals to American nationals, with respect to which two classes of claims the principal sum involved has not been paid over to the German Treuhander in accordance with exceptional war legislation enacted by the Government of Germany.

As I understand your position in regard to claims of these two classes, it is, briefly, that the American claimant under the Treaty of Berlin is entitled to recover the principal sum involved at the pre-war rate of exchange, together with interest thereon as you contend is provided for in the Treaty.

As you know, the position of my Government in respect to claims of this particular class may, I believe, be stated briefly as follows:

The American claimant is only entitled to a recovery other than in Marks in those cases where the principal sum involved was affected by the exceptional war legislation. In

such case recovery may be had based on the difference between the value of the Mark as of the date affected and the value as of the date of the repeal of the exceptional war legislation. Interest on this principal sum should also, according to the contention of my Government, be suspended during the period that the United States was at war with the Government of Germany.

As it will, in my opinion, unquestionably be of material advantage to both Governments to arrange for a settlement of the many difficult and intricate questions involved, I have the honor to submit, with the approval of my Government, a proposition in the nature of a compromise covering a general settlement of the principles governing these particular claims. This proposition, my Government feels, should be submitted in order that an amicable adjustment may be reached that will be fair, just and equitable to the two Governments and their nationals concerned, and that a speedy adjustment of the differences may be had.

With respect to Mark bank balances, I am authorized to say that I will consent to an award being entered whereby the American claimant may recover such balances on the basis of one Mark equals 16 cents; the balances in general in such claims to be stated as of April 6, 1917, or as near such date as may be convenient and practicable, the balance as of the date stated to be increased or diminished by appropriate credits or debits arising out of changes in the account during the period of belligerency as defined in the Commission's Administrative Decision No. 1. The balance as thus stated to bear interest at the rate of 5 per cent from January 1, 1920, until date of payment.

I am also authorized to say that a settlement of the Mark debts owing from German nationals to American nationals will be made on the same general basis, namely, that an award may be entered whereby the principal Mark sum involved will be valued on the basis of one Mark equals 16 cents. Where the debt became due and owing prior to April 6, 1917, such debt to be stated as of April 6, 1917, including

interest thereon at the rate agreed upon between the parties, or in the event of no express agreement, then at the rate provided for in accordance with custom and practice in good business dealings. Where the debt fell due during the period of belligerency as defined in Administrative Decision No. 1, then the debt to be stated as of its due date. The awards thus arrived at are to bear interest at the rate of 5 per cent from January 1, 1920, until paid.

It will be understood that this offer of compromise does not embrace claims involving bank deposits or private debts that may have been satified under the legislation of the Government of Germany by the German national paying the amounts involved directly to the Treuhander. In all such cases an award may be entered whereby recovery may be had of the amount involved on the basis of one Mark equals 17.4 cents; such award to bear interest at the rate of 5 per cent from date of payment to the Treuhander to the date of final payment of the award by the Government of Germany.

This offer of compromise is submitted with the understanding that as a condition precedent to an award in favor of the United States on behalf of one of its nationals, such national is to be required by the Government of the United States to execute a formal waiver of any rights he may consider he has to proceed directly against the German national involved in the courts of either Government or under the provisions of the Trading with the Enemy Act approved October 6, 1917, and the amendments thereto.

It is my further understanding in case this offer of compromise is accepted by the Government of the United States that the awards in each case are to be made by the Mixed Claims Commission, United States and Germany, against the Government of Germany, such awards, however, to set out in appropriate detail the facts in relation to the debt between the nationals involved, including the amount thereof in Marks, and the due date arrived at in the manner above outlined.

It will, of course, be understood that in submitting this

offer of compromise I reserve the right to make whatever defenses may be appropriate in any particular claim other than such defenses as may involve the question of the rate of exchange or interest.

In submitting this offer of compromise my Government desires it to be understood that the offer in no way whatsoever is to be taken as affecting in any manner the question of the liability of the particular German national involved to the German Government.

I have the honor to be, sir,

Your obedient servant

KARL VON LEWINSKY
German Agent.

"The American Agent informed the Commission in a meeting on February 25, 1925, that in accordance with authority received from The Honorable The Secretary of State he is now authorized to accept and does accept on behalf of the United States of America the proposition of the German Agent of August 19th, 1924." (Extract from the minutes of the Mixed Claims Commission, United States and Germany, February 25, 1925.)

Annex B

REPRINT OF REPLY BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG, FILED ON ORIGINAL HEARING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 764

SUMMARY DOCKET NO. 224

DIE DEUTSCHE BANK FILIALE NURNBERG, AND THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

Petitioners

vs.

CHARLES FRANKLIN HUMPHREY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG

AMOS J. PEASLEE,
Counsel for DIE DEUTSCHE BANK FILIALE NURNBERG

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK, *et al.*,
Petitioners,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF DIE DEUTSCHE BANK FILIALE NURNBERG.

The objection of the respondent that the assignments of error are not "sufficiently specific in detail or particularity", is without merit. Not only does the third assignment of error take exception to the entire computation of the District Court, but the fourth and eleventh assignments of error read specifically as follows (R. pp. 52, 54):

> "4. That said court erred in giving judgment in favor of the plaintiff and against the defendants in the sum of $11,440,275, which is for the sum of 55,468 marks, lawful money of Germany, converted from such German money into American dollars, lawful money of the United States of America (fol. 90) at the rate of exchange existing between such countries on the 12th day of June, 1915."
>
> "11. The said decree is against law in that it appears upon the face of said decree that the rate of exchange

adopted by the court for the conversion of German marks into dollars was the rate of exchange prevailing between the United States and Germany on the 12th day of June, 1915."

These assignments of error put the plaintiff fully upon notice that the Deutsche Bank objected to the computation of the rate of exchange upon the basis of the value of the mark on June 12, 1915. There is no rule of law which requires that the assignments of error shall set forth all the legal *reasons* which the litigant intends to advance in his final brief.

Upon the merits of the case the respondent's chief reliance is upon the cases of *Guinness, et al.*, vs. *Hicks*, 269 U. S. 71, and *Sutherland* vs. *Mayer*, 70 L. Ed. 781, advance sheets.

The opinion of Mr. Justice Holmes in the *Guinness case (supra)*, as has already been pointed out in our principal brief (p. 3), makes it clear that the court's ruling in that case was intended to apply where, as the opinion states, "the debt was due to an American creditor *and was to be paid in the United States*". The theory of the court was that since the debt was payable in the United States an alternative right of action for "damages in dollars" arose immediately in the United States upon the breach of the contract.

The decision in the *Guinness case (supra)*, however, is far distant from a holding that upon the default of every Japanese debtor who owes Yen *payable in Japan*, and that upon default of every Roumanian debtor who owes Lei *payable in Roumania*, and upon the default of every other debtor wherever he may be in the world *upon debts payable in his own country to citizens of his own country*, a right of action for dollars forthwith upon each such default arises in the United States.

In the case at bar the parties made their contract in Germany. The debt was solely one of German marks. The marks were repayable in Germany and neither of the parties ever at any time, so far as the record shows, had any thought

of any obligation in terms of American dollars until years after the alleged default occurred. As far as the record shows the Deutsche Bank had no property in the United States in June, 1915, and could not have been sued here at that time. The Trading with the Enemy Act, under which the suit is brought, was not passed until long after the time of the alleged default.

The case of *Sutherland* vs. *Mayer* (*supra*) was also entirely different upon its facts, because the Court was there dealing with the dissolution of a partnership which had assets both in terms of German marks and in terms of American dollars, and where there were mutual rights and obligations in dollars as well as in marks.

It is obviously impossible to apply the theory that the date of breach "crystallizes" the rights of the parties, in such a way as to ignore other material and important features of the case which have a controlling bearing upon it. Even if we employ that phrase, the question remains *what right was it that was "crystallized" under the facts of the case at bar?*

It was a right solely to collect German marks in Germany. It was not a right to collect American dollars in the United States or in Germany or anywhere else. After maturity of the debt in Germany the right continued to be merely a right to collect German marks in Germany.

It was that right, *i. e.*, to collect 39,922.05 German marks and interest in Germany, which the plaintiff six years later in 1921 commenced to assert by suit in America. The test of the value of that right is its value at the place where the liability arose. Its value there was proved as a matter of fact to be 39,922.05 German marks and interest on the day of entry of judgment, and the *procedural* possibility of bringing suit here, does not increase it. Our courts cannot properly say that the creditor's substantive rights are enlarged merely because he can get jurisdiction over his debtor in this country.

The decision of the British Court of Appeal in *Societe des Hotels le Touquet Paris-Plage* vs. *Cummings*, (1922 C. A.

1 K. B. 451), does hold exactly as we stated in our original brief (p. 7) that "the payment—even long after maturity—of the exact amount of French francs due as a French debt payable in France, was a complete discharge of the debt, and that the creditor could not recover as damages an additional amount sufficient to give him the value of the franc at the rate of exchange prevailing on the date of default". The Court of Kings Bench had held that such an additional sum could be recovered by way of damages, being under the impression that it was bound by the ruling of the House of Lords in the case of *S. S. Cecelia* vs. *S. S. Volturno* (1921 H. L.), 2 A. C. 544. The Court of Appeal, however, reversed the decision of the Court of Kings Bench and held that the ruling of the House of Lords in the *Cecelia case* was not applicable to the *Touquet case* since the *Touquet case* involved a mere debt in terms of foreign currency *and payable abroad*. The decision of the British Court of Appeal is entirely inconsistent with the principle which the respondent seeks to have the Court establish in the case at bar.

The final objection of the respondent that the Court has no right to take judicial notice of two international agreements between the United States and Germany, to wit, the agreement of August 10, 1922, which created the Mixed Claims Commission, and the agreement of February 25, 1925, which settled the basis of payment by Germany of the damage claims for the depreciation of the German mark, is obviously without merit. This Court has the right to take judicial notice of all such public treaties and international agreements.

The respondent in this case has two separate and distinct rights. He has one right which arose in Germany by a German contract through a German debt of German marks payable in Germany. He happens to be able to bring suit to enforce that right in America. The measure of his recovery in the American court should be the measure of the value of

the right in Germany and that value is 39,922.05 German marks and interest converted into dollars at the rate of exchange prevailing on April 8, 1924, when judgment was entered.

The respondent's other right is the right to collect damages against the German Government arising out of the depreciation of the German mark. That right is enforceable through the medium of the Mixed Claims Commission. It is a right with which this Court has nothing whatever to do.

Respectfully submitted,

AMOS J. PEASLEE,
Counsel for Die Deutsche Bank
Filiale Nurnberg.

POSTPONED TO MERITS
APR 19 1926

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
JAN 18 1926
WM. R. STANSBURY
CLERK

OCTOBER TERM, 1925

No. [redacted]224

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NUERNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NUERNBERG (a corporation),
Defendants-Appellants.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR ORDER AFFIRMING OR DISMISSING, AND BRIEF IN SUPPORT THEREOF.

WILLIAM P. HUBBARD,
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WILLIAM GRANT,
JOHN B. ZIMDARS,
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Solicitors for Petitioner, (Plaintiff-Appellee).

WILLIAM GRANT,
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PERRAW-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 764

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,
Plaintiff-Appellee.

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

NOTICE OF PETITION TO THE SUPREME COURT OF THE UNITED STATES TO AFFIRM OR DISMISS.

(Under Rule Six of the Rules as Effective July 1, 1925.)

Sirs:

Please take notice that the annexed petition of appellee (plaintiff) for order affirming the decision of the United States Circuit Court of Appeals, or dismissing the writ of certiorari, will be presented to the Supreme Court of the United States, on Monday, February 8th, 1926, at the opening of said court, or as soon thereafter as counsel can be heard.

Dated, San Francisco, California,
January 9, 1926.

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Solicitors for Petitioner, (Plaintiff-Appellee).

To:

PEASLEE, BRIGHAM AND GENNERT,
Counsel for Appellant-Defendant Die Deutsche Bank Filiale Nurnberg, New York City,

and

WILLIAM D. MITCHELL,
Solicitor General of the United States, Counsel for Thomas W. Miller, Alien Property Custodian, and Frank White, as Treasurer of the United States of America.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 764

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

PETITION FOR ORDER AFFIRMING OR DISMISSING.

(Under Rule Six, as Effective July 1, 1925.)

To the Honorable William Howard Taft, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

This petition by appellee (plaintiff) is for an order affirming the decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330), which in turn affirmed a decree of the United States District Court of the Northern District of California, Second Division, against the appellant-defendant, Die Deutsche Bank Filiale Nurnberg, a German corporation; or else an order dismissing the writ of certiorari granted at the October term (November 1925), by this court, at the instance of appellant-defendant, Die Deutsche Bank Filiale Nurnberg.

The grounds upon which we ask for these orders are that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument:

Rule VI, as amended July 1, 1925;

Del Pozo Y Marcos v. Wilson Cypress Co., U. S. Supreme Court Advance Sheets 70 L. Ed. 73;

Chicago R. I. & P. R. Co. v. Devine, 239 U. S. 52-54, 60 L. Ed. 140, 142;

Mo. P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. Ed. 875, 878.

(a) In that the decision by this court in *Hicks etc. v. Guinness et al.*, No. 80, and *Guinness etc. v. Hicks et al.*, No. 81, Supreme Court Advance Sheets, 70 Law Ed., page 79, has effectually and finally disposed of,

and against the contentions of appellant, Die Deutsche Bank Filiale Nurnberg, the question which in its petition to this court for certiorari, it termed "the principal question of law in the case", namely: "the rate of exchange at which the German Mark indebtedness, which arose prior to the entry of the United States into the war, is to be converted into dollars in rendering the judgment" (Pet. of App., Die Deutsche Bank Filiale Nurnberg, for certiorari, p. 4); (in fact it *is the only question of law involved);* and the Honorable Solicitor General, who joined in the petition of the appellant bank, suggested that so far as the Alien Property Custodian and the Treasurer of the United States for whom he appeared were concerned, "the decision of the petition for writ of certiorari may well be deferred until the decision in the *Guinness* case is rendered, with a view to the denial of this petition if the *Guinness* case is affirmed". (Joinder in Petition, p. 3.)

(b) The only other question involved in the case, is, as aptly put by the Honorable Solicitor General, in his joinder in the petition of appellant, Die Deutsche Bank Filiale Nurnberg (Joinder in Petition, pp. 2-3), "*a question of fact* as to the date on which the obligation matured, depending on whether a demand was made" and which "question has been resolved against the petitioners by the District Court and the Circuit Court of Appeals" (Joinder in Petition, pp. 2-3); and which concurrent finding of these courts has substantial support in the evidence; hence,

this court, following a long line of its decisions, will not disturb such concurrent finding.

Del Pozo Y Marcos v. Wilson Cypress Co., Supreme Court Adv. Opinions, 70 L. Ed. p. 75;

U. S. v. State Investment Co., 264 U. S. 206, 211, 68 L. Ed. p. 639, 642.

Under such circumstances "to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose." (*Bodkin v. Edwards*, 255 U. S. 221, 223; 65 L. Ed. 595, 597.)

Wherefore, appellee prays that this court cause its order to be made, either affirming the decree of the Circuit Court of Appeals, of the Ninth Circuit (Vol. 7 Fed. Rep., 2d Series, p. 330), or else dismissing the proceeding initiated by the appellant bank for a writ of certiorari.

Dated, San Francisco, California,
January 9, 1926.

CHARLES FRANKLIN HUMPHREY,
Petitioner, (Plaintiff-Appellee.)
By WILLIAM GRANT,
Counsel for Petitioner,
(Plaintiff-Appellee.)

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Solicitors for Petitioner,
(Plaintiff-Appellee).

State of California,
City and County of San Francisco.—ss.

William Grant, being duly sworn, says: That he is of counsel for petitioner-appellee, Charles Franklin Humphrey; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

WILLIAM GRANT.

Subscribed and sworn to before me this 12th day of January, 1926.

(Seal) Flora Hall

Notary Public in and for the City and County of San Francisco, State of California.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 764

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,

Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),

Defendants-Appellants.

BRIEF IN SUPPORT OF PETITION.

The suit was brought by appellee (plaintiff), a citizen of the United States and resident of California, in the United States District Court of the Northern District of California, under Section 9 of Trading With the Enemy Act, as amended (40 Stat. L. 411), to establish a debt claimed by appellee as owing him by appellant, Die Deutsche Bank Filiale Nurnberg, and to have the amount of any judgment recovered satisfied out of funds in the possession of the appellant, Alien Property Custodian. The indebtedness grew out of appellee's deposit, while in Germany during 1913, of money with appellant, Die Deutsche Bank Filiale Nurnberg, in two separate accounts—the one, in the name of appellee and his wife and subject to their order, and the other in the names of appellee's two sons, but subject only to appellee's order; and in case of appellee's death, subject to the order of his wife.

Appellee recovered judgment against the appellant bank for $11,440.27, which represented 41,897.40 German Marks converted into American money, as of June 12, 1915, the date upon which the District Court found that appellee had made demand upon the appellant bank, while in Germany, for the payment of the moneys represented by the two accounts.

The principal questions involved before the United States District Court of California, were:

1. Whether a sufficient demand had been made upon appellant bank by appellee (plaintiff) before he instituted his suit;

2. Whether for purposes of the judgment, German Marks were to be reduced to American money of the value at date of demand by appellee (plaintiff) for payment of the moneys on deposit in his two accounts; or of the value at date of judgment.

3. Whether interest was to be allowed appellee during the interval, between the time of such demand and date of judgment, excluding the time war actually existed between the United States and Germany. (The *Guinness* cases, U.S. Supreme Court Advance Opinion, 70 L. Ed. p. 79, disposed of this question more favorably to appellee than did the Circuit Court of Appeals of the 9th Circuit.)

All of these questions were decided against the appellant, Die Deutsche Bank Filiale Nurnberg, by the District Court. The bank appealed to the Circuit Court of Appeals, for the Ninth Circuit. That court concurred in all the findings of the District Court; discussed and disposed of all the questions in an opinion. (*Miller v. Humphrey*, 7 Fed. Rep. (2nd) p. 330.) After the decision by the Circuit Court of Appeals, appellant bank filed its petition in this court for a writ of certiorari and in that petition (Br. p. 4) said:

> "The principal question of law in the case is the question as to the rate of exchange at which the German mark indebtedness, which arose prior to the entry of the United States into the war, is to be converted into dollars in rendering the judgment.
>
> There are two cases now pending before the Supreme Court involving this same question, to wit, the case of *Guinness et al. v. Hicks et al.*, which is No. 80 on the calendar of the October

Term, 1925, which was brought to the Supreme Court upon writs of certiorari granted on June 9, 1924, and the case of *Zimmermann et al. v. Hicks et al.*, which is No. 629 on the calendar of the October Term, 1925.

A conflict of authority has existed in the lower courts and among the state courts as to whether the *date of judgment* or the *date of breach of contract*, governs in computation of the rate of exchange in such cases. The case at bar also involves certain questions relating to the relations of a bank to its depositors and the necessity for the making of a demand in order to mature the obligation, which questions are likewise involved in the said case of *Zimmermann et al. v. Hicks et al.*

There are a number of other cases now pending in the lower courts involving the question of the applicable rate of exchange with respect to such suits. Unless a writ of certiorari is granted in this case, the decision of the Circuit Court of Appeals for the Ninth Circuit will become final against your petitioner in advance of a full hearing and final determination by the Supreme Court of the important questions of law involved, and the writ is therefore requested in order that a uniform rule may be applied equitably to all cases of this character."

The Solicitor General of the United States filed a joinder in petition on behalf of the Alien Property Custodian and the U. S. Treasurer, in which he said:

"The main question in this case is whether the rate of exchange at the date the obligation became due or the rate at the date of the entry of the decree controls. This question was involved in the case of *Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United States v. Benjamin Guinness et al.*, No. 80 on the October Term, 1925, calendar of this Court, which was argued and submitted on October 22d

and 23d last. The decision in the *Guinness* case, No. 80, is expected to dispose of that question.

The decision of the United States Circuit Court of Appeals in the present case would become final November 2, 1925, were it not for the filing of this petition for certiorari, and the purpose of the Alien Property Custodian and the Treasurer of the United States in joining in this petition is to prevent the decision of the Circuit Court of Appeals from becoming final prior to the decision in the *Guinness* case.

This case also presents a question of fact as to the date on which the obligation matured, depending on whether a demand was made. This question has been resolved against the petitioners by the District Court and the Circuit Court of Appeals, and the Alien Property Custodian and the Treasurer of the United States are not disposed to urge this Court on certiorari to review that finding; and so far as they are concerned decision of the petition for writ of certiorari may well be deferred until the decision in the *Guinness case* is rendered, with a view to the denial of this petition if the *Guinness case* is affirmed."

(Joinder in Petition, pp. 2-3.)

The petition for certiorari and appellee's brief in opposition thereto were both presented while the *Guinness* cases were under submission. This court decided the *Guinness* cases adversely to the contention of the appellant bank in every particular and held, as had the United States District Court, of the Northern District of California, and the Circuit Court of Appeals of the Ninth Circuit, that German marks are to be converted into American money for purposes of judgment as of time of breach of contract; which, as applied to the facts of the instant case, means at the time appellee made his demand for payment of the

money represented by his two accounts, June 12, 1915; hence, this case requires no further argument upon that proposition and the question, to use the language of the rule of this court (Rule VI), in so far as that point is involved, is "so unsubstantial as not to need further argument" and is not now debatable.

Del Pozo Y Marcos et al. v. Wilson Cypress Co., U. S. Supreme Court Advance Opinion, 70 L. Ed. 72, at p. 75. (Decided Nov. 16th, 1925);

Chicago R. I. and Pacific R. Co. v. Devine, 239 U. S. 52, 54; 60 L. Ed. 140, 142;

Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. Ed. 875, 878.

2. The other point which was urged by the appellant, Die Deutsche Bank Filiale Nurnberg, simply involves an attack upon the concurrent finding of the U. S. District Court of California and the Circuit Court of Appeals of the Ninth Circuit, to the effect that the demand made by appellee upon appellant bank, on June 12, 1915, while in Germany, for the payment of moneys due him upon his two deposit accounts with appellant bank, was sufficient. The Circuit Court of Appeals reviewed and discussed the evidence, as to demand, at length and disposed of all of appellant bank's contentions as to the insufficiency of the evidence of demand; and fully explained its finding and conclusion in detail, in a well considered opinion. In its discussion of the evidence as to demand and disposal of the same, it said:

"Appellant bank presses the contention that, as to the joint account of Humphrey and his wife, there never was a demand for closing such account and withdrawal of the sum therein credited, and that therefore no cause of action accrued to Humphrey against the bank, and that there was no demand with respect to the account of the two sons.

The substance of Humphrey's testimony was that in August, and November, 1914, and about June 12, 1915, he made a demand for the payment of the whole sums represented in the several accounts, that a director in charge of the bank told him that a moratorium had been declared, and that he could have the usual amounts that he had been accustomed to use, but not the total sum represented by the accounts. Humphrey said that after June 12, 1915, he had deposited coupons on German bonds and dividends on the bank's shares. He could not recall all the different conversations with the bank officials, but testified that in August, 1914, the bank officials looked up his accounts, asked how much he had used, and told him that he should not take any securities out of Germany; that after the August demand he had left certain German and Hungarian securities in the bank for collection.

Defendant bank made no objection of any kind to the testimony of plaintiff, and called no officer or representative of the bank to refute what Humphrey said. The bank, however, endeavors to break the force of Humphrey's evidence by reference to certain correspondence between Humphrey and the bank. It is unnecessary to set out these writings, but for convenience they may be placed in three groups." (*Miller v. Humphrey*, 7 Fed. (2nd) p. 332.)

The opinion then analyzes certain letters which the appellant bank's counsel contended showed that appellee did not make the demand of June 12, 1915, as

contended; and after disposing of these contentions concluded this branch of the case as follows:

> "In weighing the several letters in connection with Humphrey's oral testimony, we may look in retrospect and consider the history of the times, the unusual conditions which prevailed in Germany about and after August 1, 1914, the serious situation which then surrounded Humphrey which may have influenced his actions.
>
> (2) We attach no significance to the fact that Humphrey's demand was oral. The bank having told the depositor that it availed itself of the privilege which usually goes with a moratorium, should not now be heard to say that because the demand was not in writing it can avoid recognition of the obligation." (*Miller v. Humphrey*, 7 Fed. (2d) pp. 332-333.)

The record before this court shows that this concurrent finding of the U. S. District Court and the Circuit Court of Appeals of the 9th Circuit has very substantial support in the evidence. Hence, this court will not disturb it.

Del Pozo Y Marcos v. Wilson Cypress Co., U. S. Supreme Court Advance Opinions, 70 L. Ed. 72;

Morewood v. Enequist, 23 How. 491, 495, 16 L. Ed. 516, 517;

Stuart v. Hayden, 169 U. S. 1, 14; 42 L. Ed. 639, 643;

Natl. Bank v. Shackelford, 239 U. S. 81, 82; 60 L. Ed. 158, 159; 36 Sup. Ct. Rep. 17;

Yuma County Water Users' Asso. v. Schlecht, 262 U. S. 138, 146; 67 L. Ed. 909, 914; 43 Sup. Ct. Rep. 498;

United States v. State Invest. Co., 264 U. S. 206, 211; 68 L. Ed. 639, 642; 44 Sup. Ct. Rep. 289;

Bodkin v. Edward, 255 U. S. 221; 65 L. Ed. 595, 597;

Page v. Rogers, 211 U. S. 575, 577; 53 L. Ed. 332;

Washington Securities Co. v. U. S., 234 U. S. 76, 78; 58 L. Ed. 1220, 1222;

Wright-Blodgett Co. v. U. S., 236 U. S. 397, 402; 59 L. Ed. 637, 639.

Wherefore, it appears that all of the questions on which the decision of this cause depends are so unsubstantial as to need no further argument and that the cause may properly be disposed of, by an order, either dismissing the proceeding initiated by the appellant bank for certiorari; or, by affirming the decision of the Circuit Court of Appeals of the Ninth Circuit.

Dated, San Francisco, California,
January 9, 1926.

Respectfully submitted,
WILLIAM GRANT,
Of Counsel for Petitioner,
(Plaintiff-Appellee).

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Solicitors for Petitioner,
(Plaintiff-Appellee).

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 764

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner,

Plaintiff-Appellee.

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
City and County of San Francisco.—ss.

Horace F. Frye, being duly sworn, deposes and says:

He is a citizen of the United States and resident of the City and County of San Francisco, above the age of twenty-one years and is associated with William P. Hubbard, one of the solicitors for appellee in the above entitled matter; that on January 12th, 1926, he deposited a copy of the foregoing petition for order affirming decision of the Circuit Court of Appeals of the Ninth Circuit, or for order dismissing the proceedings initiated by appellant bank, for a writ of certiorari, and brief in support thereof, in the Post Office at the City and County of San Francisco, State of California, properly enclosed in a sealed envelope, addressed to Messrs. Peaslee, Brigham and Gennert, solicitors for appellant, Die Deutsche Bank Filiale Nurnberg, at their place of business, No. 501 Fifth Avenue, in the City of New York, State of New York, and also deposited a copy of the said petition and brief, likewise enclosed in a sealed envelope, addressed to the Hon. William D. Mitchell, Solicitor General of the United States of America, at the City of Washington, District of Columbia, and caused each of said sealed envelopes so addressed as aforesaid, to be registered by the Post Office Department of the United States Government, at said City and County of San Francisco, and prepaid the postage on each of said sealed envelopes; that there is a United States Post Office at the City and County of San Francisco, State of California, and also one at the

City of New York and one at the City of Washington, District of Columbia, and between said City and County of San Francisco and each of said Cities of New York and Washington, District of Columbia, there is a regular daily communication by mail.

HORACE F. FRYE.

Subscribed and sworn to before me this 12th day of January, 1926.

(Seal) Flora Hall,
Notary Public in and for the City and County of San Francisco, State of California.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

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The Petition of CHARLES FRANKLIN HUMPHREY, for an Order Affirming the Decision of The Circuit Court of Appeals of The Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or Else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner, Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

REPLY TO PAPERS IN OPPOSITION TO MOTION FOR ORDER AFFIRMING THE DECISION OF THE CIRCUIT COURT OF APPEALS OR DISMISSING THE WRIT OF CERTIORARI, AND CONSENT TO SUBSTITUTION, TO DISMISSAL OF CERTIORARI AND TO ISSUANCE OF MANDATE.

WILLIAM GRANT,
Hobart Building, San Francisco,
Counsel for Appellee.

WILLIAM P. HUBBARD,
Mills Building, San Francisco,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Hobart Building, San Francisco,
Solicitors for Plaintiff-Appellee.

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In the Supreme Court

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United States

OCTOBER TERM, 1925

No. 764

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order Affirming the Decision of The Circuit Court of Appeals of The Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or Else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner, Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

REPLY TO PAPERS IN OPPOSITION TO MOTION FOR ORDER AFFIRMING THE DECISION OF THE CIRCUIT COURT OF APPEALS OR DISMISSING THE WRIT OF CERTIORARI, AND CONSENT TO SUBSTITUTION, TO DISMISSAL OF CERTIORARI AND TO ISSUANCE OF MANDATE.

Since filing our petition for order affirming the decision of C. C. A., 9th Circuit (7 Fed. 2 Ed. 330), or dismissing the writ of certiorari granted by this court, November 23, 1925, at the instance of the defendant-appellant, Die Deutsche Bank Filiale Nurnberg, and the Solicitor General appearing for the United States Alien Property Custodian and the Treasurer of the United States, we have received from the Solicitor General a motion to substitute Howard Sutherland, the present Alien Property Custodian, instead of Thomas W. Miller, resigned; and a motion by the Solicitor General to dismiss the writ of certiorari as to the Alien Property Custodian and the United States Treasurer, for the reason that "the questions involved in the case, so far as they are concerned, having been determined by this court in the cases of Frederick C. Hicks, Alien Property Custodian, et al., Benjamin Guinness et al. and Benjamin Guinness et al. v. Frederick C. Hicks, Alien Property Custodian, et al., Nos. 80 and 81, on the docket of this court"; also a statement in such moving papers that the Solicitor General consents, on behalf of the Alien Property Custodian and the Treasurer of the United States, that if the motion of plaintiff-appellee to dismiss or affirm shall be granted as to the defendant-appellant Die Deutsche Bank Filiale Nurnberg the mandate may go down forthwith.

Respondent (plaintiff-appellee) joins in such request and consent.

We have, likewise, just received, February 10, 1926, from appellant, Die Deutsche Bank Filiale Nurnberg,

a document termed "Papers in Opposition to Motion for Order Confirming the Decision or Dismissing the Writ of Certiorari".

In this document the appellant bank completely shifts its position, as to the principal question of law involved and as to the effect of the decision of the *Guinness* case upon the case at bar, from the position it assumed originally when urging this court to grant the writ of certiorari.

In its petition for certiorari, to quote its own language from its petition, it said:

> "*The principal question of law in the case is the question as to the rate of exchange at which the German mark indebtedness, which arose prior to the entry of the United States into the war, is to be converted into dollars in rendering the judgment.*
>
> There are two cases now pending before the Supreme Court involving this same question, to wit, the case of *Guinness et al. v. Hicks et al.*, which is No. 80 on the calendar of the October Term, 1925, which was brought to the Supreme Court upon writs of certiorari granted on June 9, 1924, and the case of Zimmerman et al. v. Hicks et al., which is No. 629 on the calendar of the October Term, 1925.
>
> A conflict of authority has existed in the lower courts and among the state courts as to whether the *date of judgment* or the *breach of contract*, governs in computation of the rate of exchange in such cases. The case at bar also involves certain questions relating to the relations of a bank to its depositors and the necessity for the making of a demand in order to mature the obligation, which questions are likewise involved in the said case of *Zimmerman et al. v. Hicks et al.*

> There are a number of other cases now pending in the lower courts involving the question of the applicable rate of exchange with respect to such suits. Unless a writ of certiorari is granted in this case, the decision of the Circuit Court of Appeals for the Ninth Circuit will become final against your petitioner in advance of a full hearing and final determination by the Supreme Court of the important questions of law involved, and the writ is therefore requested in order that a uniform rule may be applied equitably to all cases of this character." (Petition for Writ of Certiorari and Brief, pp. 4-5.)

And in its brief in support of this petition, it said:

> "*For the purposes of this application it is perhaps sufficient to call attention to the fact that writs of certiorari were granted by this Court in the said case of Guinness et al. v. Hicks et al., on June 9, 1924, 265 U. S. 579, to review exactly the same question which is here presented.*" (Petition for Writ of Certiorari and Brief, p. 14.)

It is, thus, apparent at a glance that it contended, when it presented its petition for writ of certiorari, that the *principal question* of law involved in this case was as to the rate of exchange at which German marks indebtedness which arose prior to the war between Germany and the United States is to be converted into dollars, in rendering the judgment; and that the decision by this court in the *Guinness* cases, U. S. Supreme Court Advance Sheets, 70 L. Ed. p. 79, would dispose of the question; as in fact, it actually has; the Solicitor General, also, in his joinder in that petition for certiorari, likewise, undoubtedly, so construed the petition of the bank for certiorari, for he said, in such joinder:

"The main question in this case is whether the rate of exchange at the date the obligation became due or the rate at the date of the entry of the decree controls. This question was involved in the case of *Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United States, v. Benjamin Guinness et al.*, No. 80 on the October Term, 1925, calendar of this Court, which was argued and submitted on October 22nd and 23d last. The Decision in the *Guinness* case, No. 80, is expected to dispose of that question." (Joinder in Petition, p. 2.)

The Solicitor General has confirmed that such was his understanding by now requesting a dismissal of the writ of certiorari in so far as his clients are concerned, for the reason given by him, that the decision by this court in the *Guinness* case, 70 L. Ed. 79, has decided the principal question of law, to have which determined he joined in the petition of the bank for certiorari; and the Solicitor General, in refusing to join the appellant bank in its further contention that the case at bar also involves certain questions relating to the relation of a bank to its depositors and the necessity for the making of a demand in order to mature the obligation fully recognizes the well-established rule laid down by this court that it will not disturb the concurrent findings of fact of the District Court and the Circuit Court of Appeals, when supported by substantial evidence. (*Del Pozo Y. Marcos v. Wilson Cypress Co.*, U. S. Supreme Court Advance Opinion, 70 L. Ed. p. 73.) This rule disposes of the bank's alleged other questions relating to the relation of a bank to its depositors and the necessity for the making of a demand. The foregoing ought at once to

dispose of the whole matter. (*Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240; 62 L. Ed. 1096.)

The appellant bank now, since the decision against its contention by this court in the *Gainness* case (70 L. Ed. p. 79), contends that a decision in the *Zimmerman* cases, Nos. 629 and 630, of the calendar of the October Term, is necessary to determine, what it asserts, are other important questions of law involved in the case at bar.

All that the appellant bank said in its petition for certiorari as to the *Zimmerman* case, upon which it now so strongly relies, for holding this case here, other than in the portion of its petition just quoted above, is as follows:

> "In the case of *Zimmerman et al. v. Hicks et al.*, decided by the Circuit Court of Appeals for the Second Circuit on May 4, 1925 (now before the Supreme Court as *Zimmerman et al. v. Hicks et al.*, Nos. 629 and 630 on the October 1925 Calendar), the Circuit Court of Appeals for the Second Circuit in an opinion written by Judge Hough, even though it adopted the 'breach date theory' for computing the rate of exchange, held that there could be no default on the part of a bank until a demand actually occurred, and applied the rate of exchange for German marks existing in December 1921, when the first demand appeared in that case." (Petition for Writ of Certiorari and Brief, p. 16.)

As we have pointed out in our petition to dismiss or affirm (pages 13-15), both the District Court and Circuit Court of Appeals, in concurrent findings, expressly found as a fact, upon substantial evidence in the record now before this court (Transcript of Record,

pp. 109-119; 60-71; 27-28) that the plaintiff-appellee did make a sufficient demand in Germany upon the appellant bank for the payment of all the money in his two bank accounts on June 12, 1915, and that the bank refused to make such payment; both these lower courts then, simply, applied the rule as to the time of estimating the rate of exchange to reduce the marks represented by the two accounts to American money, for purposes of decree; and in doing so followed the rule laid down by the Circuit Court of Appeals, 2nd Circuit, in the *Guinness* case, 299 Fed. 538; and as affirmed by this court in that case, Supreme Court Opinions, 70 L. Ed. 79, and so reduced the marks to American money, as of the date of the demand so made by plaintiff, June 12, 1915. This concurrent finding of these two courts will not be disturbed here.

The case at bar does not involve any other "questions relating to the relations of a bank to its depositors and the necessity for the making of a demand in order to mature the obligation", as asserted by the appellant bank, other than such questions of fact as have been fully disposed of by the concurrent findings of these two lower courts.

1. While we agree with appellant bank's counsel, that it is not to be presumed that this court, acted through either ignorance or disregard of a decision which it had previously handed down, when it granted the writ of certiorari in this case, one week after it had decided the *Guinness* case, 70 L. Ed. 79; yet, it is possible that this court was misled by some of the statements in the petition of the bank for the writ;

and, may yet conclude to dismiss or affirm, if we can point out the inconsistent position of the appellant bank assumed at this time, when resisting our petition to affirm or dismiss, and its petition when applying for the writ.

Davis v. Currie, 266 U. S. 182; 69 L. Ed. 234;
Erie R. Co. v. Kirkendall, 266 U. S. 185; 69 L. Ed. 236;
Layne & Bowler Corp. v. Weston Well Works, 261 U. S. 387; 67 L. Ed. 712;
Furness-Withy & Co. v. Yang Tsze Ins. Assn., 242 U. S. 430; 61 L. Ed. 409;
U. S. v. Rimer, 220 U. S. 547; 55 L. Ed. 578.

2. It is now asserted by appellant bank that neither the decision by this court in the *Guinness* case nor the citations in our petition to dismiss or affirm determine the issues which are presented by the record in the case at bar.

The record is the best evidence. Appellant bank's assignment of errors in the Circuit Court of Appeals is found on pages 85-94 of the transcript of record sent to this court by the Circuit Court of Appeals when the petition for writ of certiorari was filed. (pp. 50-55 printed record.) They are summarized by appellant bank's attorneys in their brief before the Circuit Court of Appeals as follows:

> "(1) As to the joint account, a question of fact, with its legal implication, will be presented, namely: that no demand for the closing of the joint account and the withdrawal of the amount therein credited as balance, was made upon the bank by any authorized person, or in any authorized mode, or at all; and by legal consequence, no

cause of action against the bank accrued to this claimant.

(2) The absence of this essential demand will also be presented in respect to the account of James Warren Humphrey and John Charles Humphrey; and herein, the absence of any authorized or competent representative of the depositors will be noted.

(3) Assuming that any recovery in the pending suit is admissible on the evidence and the law, it would still remain, and the question will, therefore, be presented—an important and interesting one—that the rate of exchange, as between American dollars and German marks, should be ascertained and applied as of the time of trial and judgment; not as of the time of any alleged demand upon the bank, if such demand could be successfully pretended.

ASSIGNMENT OF ERRORS.

The assignment of errors will be found at pages 85-94 of the record. As usually happens, there is a good deal of particularity in the assignment made. It is believed that the questions to be made on this appeal are gathered up in the three principal inquiries, suggested at the close of the foregoing statement of the case. We may be permitted, then, to dispense with any more detailed repetition of the assignment of errors." (Pages 11 and 12, Brief for Appellant Bank in Circuit Court of Appeals.)

It is now contended by the appellant bank that the decision in the *Guinness* case applies when the debt is to be paid in the United States, and that the decision of this court is based upon the theory that the American firm had a claim here, not for the debt but at its option for damages in dollars; that the

contrary state of facts exist in the case at bar, in that appellee's cause of action did not arise in the United States, but in Germany and for that reason appellant bank should now "have an opportunity to present its views to the court at the proper time upon this important phase of the legal problems involved".

But the appellant bank in its brief accompanying its petition for writ of certiorari asserted as follows:

> "For the purposes of this application it is perhaps sufficient to call attention to the fact that writs of certiorari were granted by this Court in the said case of Guinness et al. v. Hicks et al., on June 9, 1924, 265 U. S. 579, *to review exactly the same question which is here presented.*" (Appellant's petition and brief for certiorari, p. 14.)

It is true in the case at bar plaintiff, an American citizen, while in Germany, deposited his money represented by his judgment in this case, with appellant, a German bank, and personally made his demand in Germany on the bank, on June 12, 1915, for payment of the amount represented by his deposit accounts and the bank then refused payment in Germany. Both the District Court and the Circuit Court of Appeals concurrently found that plaintiff's demand was actually made on June 12, 1915, and that it was a sufficient demand and fixed that as the date upon which to estimate the value of German marks for purposes of the judgment in the American court—the breach date. The record before this court shows that never at any stage of the case has appellant bank urged or pointed out that in estimating the value of the mark for pur-

poses of reducing the same to American dollars for the judgment when suit is brought in an American court, any different rule is to apply, because the mark was payable in Germany. It has invoked no German law which is contended makes a different rule. Neither have they suggested that the German law was any different. They cannot at this late date invent any such excuse, for the purpose of holding this case here until some other case is determined.

The opinion of this court in the *Guinness* case recognizes that no different principle of law is to be applied to such facts as exist in the case at bar from those existing in the *Guinness* case. In this connection the opinion states:

> "*The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractor would have had if the contract had been performed'*, Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 100, 64 L. ed. 801, 803, 40 Sup. Ct. Rep. 504; it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time. The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and on the other hand the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come seems to us to flow from fundamental theory and not to need other support." (*Hicks et al. v. Guinness et al.*, 70 L. ed. p. 80-81.)

It is established by this court that upon certiorari it will not review points not urged in the lower courts;

nor will it consider any matter not relied upon in asking for the writ.

Great Northern R. Co. v. U. S., 208 U. S. 452, 52 L. ed. 567;

Greene Co. v. Thomas, 211 U. S. 598, 53 L. ed. 343;

McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762;

Hubbard v. Tod, 171 U. S. 474, 43 L. ed. 246;

Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 62 L. ed. 1096.

3. It is asserted that there are certain alleged other important questions of law which were untouched by this court in its decision in the *Guinness* case (70 L. ed. p. 79) which arise by reason of the Treaties of Versailles and Berlin, and that they must be passed upon either in the case at bar or the *Zimmerman* cases, Nos. 729 and 630 of this October Term calendar.

The record in the case at bar affirmatively shows that never at any time in the District Court or the Circuit Court of Appeals, or in its petition for certiorari, has appellant bank ever urged that either of the treaties in any manner affected plaintiff's right to recover. (*Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 62 L. ed. 1096.)

The opinion of the Circuit Court of Appeals, 2nd Circuit, in the *Guinness* case, 299 Fed. 538, which was affirmed by this court, 70 L. ed., p. 79, shows that these treaties were both very strongly relied upon by defendants in that case and the Circuit Court of Ap-

peals held that they had no effect whatsoever upon plaintiff's right to maintain his cause of action under Section 9 of the Trading With the Enemy Act, the section under which this suit is prosecuted by plaintiff here. When that case reached this court the attorneys for the defendant, either abandoned these defenses, as worthless, or else this court utterly disregarded them for the same reason; for the opinion of this court in the case (70 L. ed. p. 79) states "*the only questions raised and argued here*", are as to interest and date the ~~work~~ is to be estimated in dollars to fix the amount of the decree. Therefore, we may assume, since present counsel for appellant bank was one of the counsel in this court, who appeared in the *Guinness* case, that he was either satisfied with the ruling of the Circuit Court of Appeals or realized when he reached this court that the contention was without merit; or if he argued the matter this court considered it without merit.

Besides, this court has but recently said that these treaties do not affect a suitor's right to maintain his suit under Section 9 of the Trading With the Enemy Act.

> *White v. Mechanics Securities Corporation*, (Dec. 14, 1925) 70 L. ed. p. 126.

It is simply an afterthought for the purpose of holding this case, after the decision by this court in the *Guinness* case, which is against the sole contention of the appellant bank, which it urged as the ground for the writ of certiorari.

Under the decisions referred to above, this court will not examine this question at this late date.

4. Another reason urged by the appellant bank for denying the motion to dismiss or affirm is its assertion that the record in the *Guinness* case consisted of a very brief and unsatisfactory stipulation as to facts and "left in the realm of surmise and conjecture many important questions which must ultimately be authoritatively determined before the law applicable to a large group of cases pending in the lower courts involving the rate of exchange applicable to German mark obligations, will be finally determined"; and that the record in the case at bar and in the *Zimmerman* cases set forth the proceedings of actual trials, not mere stipulations of fact and raise important points which should be considered. We know nothing of the record in the *Zimmerman* case; but the record in the case at bar is made up entirely of a stipulation of facts, except as to certain supplemental testimony, given by plaintiff-appellee, upon the one question as to the time when he made his demand. (Record as sent to this court by Circuit Court of Appeals upon application for certiorari, pages 35-60, 67-70.)

There are no questions shown by this record, other than such as we have pointed out, and the bank's counsel does not show us what these important questions are but keeps this court and ourselves "in the realm of surmise and conjecture" as to what they are.

5. Counsel assert that it did not appear in the record in the *Guinness-Hicks* cases that the relation of the parties was that of a banker to its depositors, but that such does appear in the *Zimmerman* case and

the case at bar; and counsel suggest that "very different legal results may follow". They do not point out in what particular such different results may follow.

The bank's counsel disclaims any desire to attack the concurrent findings of the lower courts; he asserts the bank is simply raising issues of law as to whether the facts found by the District Court and the Circuit Court of Appeals were sufficient to place the bank in default, since the transaction occurred in a foreign country and involved foreign currency; and assert this question is not determined by any cases referred to by us and is "a very important one".

Again, we must invoke the record. Never at any time up to the present has the bank's counsel attempted to invoke any German law as being different from the law of this country as applied by both the lower courts, namely: that demand for payment by a depositor is necessary before he can sue the bank for such deposit; and that after such demand he may recover the amount of such deposit; and if it is represented by a foreign currency it must be reduced to American money for purposes of judgment as of date of breach of contract—date of demand and refusal—in the case at bar, June 12, 1915. (*Guinness* case, 70 L. ed. p. 79.) Certainly, somewhere along the line, this question should have been, in all fairness, in some concrete form presented by the appellant bank to the lower court and opposing counsel and in its petition for certiorari. It has not been presented in any manner, as the record clearly shows. (Transcript of record sent to this court from C. C. A., 9th Circuit,

pp. 18-25; 27-28; 33-34; 35-80; 85-94; 108-119. Printed record, pp. 11-15; 16-17; 19; 20-46; 50-55; 58-65.)

As said by the Circuit Court of Appeals in the *Zimmerman* case (7 Fed. (2nd) 445):

> "It is fundamental in both these suits to ascertain and declare the legal relation between plaintiffs and the defendant banks. It was admittedly that of depositor and banker, and there is no evidence that the nature of that common relation is not the same under German, Austrian, and American law."

The District Court and the Circuit Court of Appeals fixed the bank's liability in the case at bar, as at the time of demand and refusal to pay (*Leather Mfgrs. Nat. Bank v. Merchants Nat. Bank*, 128 U. S. 26; 32 L. ed. 342); not at any earlier date; certainly no law of Germany would fix it at a later date; if so, the record is silent as to the existence of any such German law. The record shows that none was invoked or produced by the appellant bank to show that it should have been paid at a later date; or that the rate of exchange should have been calculated as at an earlier date than date of demand and refusal. This court's decision in the *Guinness* case has fixed the breach date, for the case at bar June 12th, 1915, date of demand and refusal, as date for reducing to American money for purposes of the judgment. (70 L. ed. p. 79.) The record shows appellant bank has never produced any German law to the contrary and has never contended that there is any German law to the contrary either in the lower courts or in its petition to the court for certiorari. How can it present an argument upon the hearing of this case, that there is any

such German law to the contrary, without having presented the matter at length in the record before this court? (*Alice State Bank v. Houston Poultry Co.*, 247 U. S. 240, 62 L. ed. 1096.)

6. The bank's counsel assert that the decision of the Circuit Court of Appeals in the *Zimmerman* case (7 Fed. (2d) 443) was in favor of the foreign bank and that that court applied not the pre-war rate of exchange but the rate existing in December, 1921. We think that out of fairness both to this court and opposing counsel appellant bank's counsel, since, he appears as one of counsel of record before the Circuit Court of Appeals in the *Zimmerman* case, should have pointed out the reasons why the decision in the *Zimmerman* case was in favor of the foreign bank, as he asserts it was; and why the rate of exchange existing in 1921 was applied by the Circuit Court of Appeals rather than the pre-war rate. The decision of the Circuit Court of Appeals in this *Zimmerman* case (7 Fed. (2d) p. 443) was in favor of the German bank, *because the Circuit Court of Appeals found that no demand had ever been made upon the bank by the plaintiff in that case for payment of his account;* that plaintiff relied for his alleged demands upon the fact that war was declared on April 6, 1917, upon the filing of certain documents with the Alien Property Custodian in March, 1919, and by an exchange of telegrams and letters during August, 1919; none of which the Circuit Court of Appeals held were sufficient to constitute a sufficient demand to put the bank in default; and expressly held that the only demand pleaded, which was sufficient to put the bank in de-

fault, was one of December 15, 1921, and for that reason no default on the part of the bank occurred prior to that date; the opinion saying in that connection, as follows:

> "In the case, therefore, of the Deutsche Bank (and here the cases of the two banks diverge) we are constrained to the conclusion that the only demand for this deposit account was the one pleaded in the bill, i. e., of December, 1921; so that plaintiffs can recover only the number of marks sued for and agreed upon at the rate of exchange of the date of demand, i. e., said December." (7 Fed. (2d) 446.)

This is quite a different situation from what the court would gather by casually reading the statement of the bank's counsel that the decision of the Circuit Court of Appeals was in favor of the foreign bank and that the court refused to apply the pre-war rate of exchange, but instead applied the one in December, 1921. It shows clearly that nothing said in that case in any way trenches upon the decision of the Circuit Court of Appeals in our case, which held that plaintiff had made a sufficient demand on June 12, 1915, the date it found as the breach date by the bank, and at which it estimated the value of the marks for the purposes of the judgment in American dollars.

7. In conclusion, and as the final reason for asking this court to hold plaintiff's case here, the bank's counsel urges that it will be unfair to the appellant bank to either dismiss or affirm at this time, until it is given "a full opportunity" "to present its views on these important questions of law which affect so many other cases which are as yet undetermined"; and in

an affidavit appended to the bank's opposition, counsel makes oath that in his opinion there are numerous questions of law raised by the record in the case at bar which were not finally determined by this court in the *Guinness* case (70 L. ed., p. 79). Nowhere does he lay his finger specifically upon any of these alleged important questions of law appearing in the record in our case; nor did he do so when applying for the writ of certiorari. He cannot; they do not exist. The rate of exchange and interest were the principal questions asserted by the bank's counsel at all times, according to the record in this case, until the presentation of our petition to dismiss or affirm.

Any of these other questions intimated or suggested, were disposed of by the concurrent findings of the lower court and the *Guinness* case decided by this court has disposed of the questions of the rate of exchange and interest against the contention of the appellant bank. As we read the record in the *Zimmerman* case, 7 Fed. 2d. 443, it is in line and full accord with the decision of this court in the *Guinness* case, and involves no different propositions of law other than such as have been well established previously by the decisions of this court; for instance, that a demand is necessary upon a bank before a depositor can sue, and the like. Anything which the appellant bank at this late date desires to lug into the case to save itself, is too late and a clear afterthought, without any basis in the record for its support.

We, respectfully, submit plaintiff-appellee is entitled to have his motion granted.

Should this court, however, determine not to dismiss or affirm at this time; we, respectfully, ask that this cause be either placed upon the summary docket (Rule 6, sub. 6); or, else, be placed on this October Term Calendar, to be disposed of along with the *Zimmerman* cases, Nos. 629, 630 of said calendar.

Dated, San Francisco,
February 20, 1926.

Respectfully submitted,
WILLIAM GRANT,
Counsel for Appellee.

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Solicitors for Plaintiff-Appellee.

FILED
MAR 1 1926
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 76[redacted]224

THE PETITION OF CHARLES FRANKLIN HUMPHREY, FOR AN ORDER AFFIRMING THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT (7 FED. REP. 2D ED. P. 330) OR ELSE DISMISSING THE WRIT OF CERTIORARI GRANTED AT THE OCTOBER TERM, 1925, AT THE INSTANCE OF APPELLANT-DEFENDANT, DIE DEUTSCHE BANK FILIALE NURNBERG.

CHARLES FRANKLIN HUMPHREY,
Petitioner, Plaintiff-Appellee,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA, FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA, AND DIE DEUTSCHE BANK FILIALE NURNBERG (A CORPORATION),
Defendants-Appellants.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION OF THE RESPONDENT TO DISMISS OR AFFIRM.

AMOS J. PEASLEE,
Solicitor for DIE DEUTSCHE BANK FILIALE NURNBERG.

Stillman Appellate Ptg. Co., 200 William Street, New York.

IN THE

Supreme Court of the United States

The Petition of CHARLES FRANKLIN HUMPHREY, for an Order Affirming the Decision of the Circuit Court of Appeals of the Ninth Circuit (7 Fed. Rep. 2d Ed. p. 330) or else Dismissing the Writ of Certiorari Granted at the October Term, 1925, at the Instance of Appellant-Defendant, DIE DEUTSCHE BANK FILIALE NURNBERG.

October Term, 1925.
No. 764.

CHARLES FRANKLIN HUMPHREY,
Petitioner
Plaintiff-Appellee,

vs.

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Defendants-Appellants.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION OF THE RESPONDENT TO DISMISS OR AFFIRM.

The "Reply" submitted by counsel for the Appellee refers to a motion of the Solicitor General to dismiss the writ of certiorari as to the Alien Property Custodian and the United States Treasurer.

There is no such motion pending before this Court. The Solicitor, after serving the papers in question, withdrew the motion upon reconsideration of the points of law involved.

In addition to the question of law in the case referred to in the brief of the Solicitor General, there are other questions which have already been outlined in our papers filed in opposition to this motion.

The portion of the Deutsche Bank's petition for certiorari quoted by the Appellee shows that the petition referred to "two cases now pending before the Supreme Court", including not only the case of *Guinness et al. vs. Hicks et al.*, but also "the case of *Zimmermann et al. vs. Hicks et al.* which is number 629 on the calendar of the October Term, 1925."

The latter of these two cases has not yet been reached for argument; the numerous questions of law involved were not disposed of by the decision on the narrow issues raised in the Guinness case; and it seems proper, therefore, that this case should take its orderly course and be discussed in detail when reached for argument on the calendar of this court.

Respectfully submitted,

AMOS J. PEASLEE,
Solicitor for Die Deutsche
Bank Filiale Nurnberg.

Office Supreme Court,
FILED
OCT 5 192
W. R. STANSB
CL

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. [redacted] 224

Summary Docket No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG,
Petitioner,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

BRIEF OF RESPONDENT, ON HIS MOTION TO DISMISS OR AFFIRM AND UPON MERITS.

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PHINEAS-WALKER PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG,
Petitioner,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

BRIEF OF RESPONDENT, ON HIS MOTION TO DISMISS OR AFFIRM AND UPON MERITS.

JURISDICTION.

There are two matters before this court.

FIRST: Respondent's motion to affirm the decision of the Circuit Court of Appeals, for the Ninth Circuit, which in turn affirmed the decree of the District Court, for the Northern District of California, Second Division, rendered in favor of appellee; or else, to dismiss the writ

of certiorari for the reason that the questions on which the decision depends are so unsubstantial as to need no further argument; that the assignment of error is insufficient to present the question argued (R. 54); that the point argued is different from the points urged in the petition for the writ.

SECOND: A hearing upon the merits of the case as presented by petitioner's brief upon the merits.

THE MOTION TO DISMISS OR AFFIRM.

Petitioner in its petition for the writ of certiorari sets for the following as the grounds for asking for the writ.

1. That the principal question of law in the case is whether the date of breach of contract—in the case at bar date of refusal by bank after demand in Germany by a depositor to pay marks—or date of judgment is to be taken as the date upon which is to be computed the rate of exchange in converting German marks into United States money for purposes of judgment; that there are two cases now pending before this court—*Guinness et al. v. Hicks et al.*, 299 Fed. Rep. 538 and 291 Fed. 768, and the case of *Zimmerman v. Hicks*, which involve the same question and which were brought here by writs of certiorari; that a conflict of authority exists in the lower courts and among the state courts as to whether the date of judgment or the date of breach of contract governs in computing the rate of exchange; that there are a number of other cases pending in the lower courts, involving the same question; that unless a writ of cer-

tiorari is granted by this court the decree of the Circuit Court of Appeals in this case will become final in advance of a full hearing and final determination by this court in these other cases; that the writ is desired in order that a uniform rule may be applied equitable to all cases, and in order that the final decision in the case at bar may accord with the final decisions of this court in the two cases just referred to and in order that execution may not be levied in the meantime; that the decisions of the lower courts of the United States and of the state courts are in hopeless conflict and the question has never been squarely presented to this court.

(Pet. for writ 3-14.)

2. That the case at bar also involves certain questions relating to the relations of a bank to its depositors and the necessity for making a demand in order to mature the obligation, which question is asserted, are likewise involved in the *Zimmerman* case; that the Circuit Court of Appeals found that a demand was made by the plaintiff on June 12, 1915; and that it seems certain that no proper demand was ever made at any time of a character which would place a bank in default toward a depositor; that it also appears that certain of the amounts comprised within the judgment were deposited at a later date than the time of the demand and as to those items there is no evidence of any demand prior to the institution of the suit.

(Pet. for writ 4-17.)

In its brief, however, it contended for and discussed just two propositions, and no more, as follows:

> "(1) The Circuit Court of Appeals erred in holding that the date of default rather than the date of

judgment controlled the time for computation of the rate of exchange in converting the German marks into dollars." (Br. in Support of Pet., p. 13.)

"(2) The Circuit Court of Appeals erred in holding that there was sufficient evidence of a demand on the bank to place it in default and also erred in allowing the pre-war rate of exchange even as to other deposits made at a later time and as to which there is no evidence whatever that there ever was any demand for the sums prior to the institution of the suit." (Br. in Support of Pet., pp. 15-16.)

Subsequently, and in reply to our petition to dismiss or affirm petitioner presented what it termed "papers in opposition to motion for order affirming the decision of the Circuit Court of Appeals or dismissing the writ", and there contends that the decision by this court in *Guinness et al. v. Hicks et al.*, 269 U. S. 71, only applies where the debt is to be paid in the United States and that under the state of facts appearing in the record in the case at bar, the cause of action did not arise in the United States, but arose abroad; that appellant desires an opportunity to present its views to this court at the proper time on this important phase of the legal problems involved; that other extremely important questions of law which were left untouched by the decision in *Guinness, et al. v. Hicks, et al.*, arise by reason of the provisions of the Treaty of Versailles and the Treaty of Berlin; that these questions must ultimately be passed upon by this court, either upon the record in the case at bar or the record in the case of *Zimmerman, et al. v. Hicks, et al.*, No. 629 and 630 of the October, 1925, calender term of this court. Furthermore, that the record in the *Guinness* case consisted, only, of a very brief and unsatisfactory stipulation as to the facts and left in the

"realm of surmise and conjecture many important questions", which it asserts must ultimately be authoritatively determined before the law applicable to the large group of cases pending in the lower courts, involving the rate of exchange applicable to German mark obligations will be finally determined; that the record in the case at bar and the record in *Zimmerman, et al. v. Hicks, et al.*, both set forth the proceedings at actual trials—not mere stipulations of fact and raise important points which should be considered; that in the case of *Guinness, et al. v. Hicks, et al.*, it did not even appear in the record that the relation of the parties was that of a banker to its depositor, while in the case at bar and in the case of *Zimmerman, et al. v. Hicks, et al.*, such fact does appear; that, therefore, "very different legal results may follow"; that appellant disclaims it is attacking any concurrent findings of fact of the District Court and the Circuit Court of Appeals; that it is raising issues of law as to whether the facts concurrently found by these courts, that a sufficient demand was made by plaintiff upon the appellant bank on June 12, 1915, were sufficient to place the bank in default towards the plaintiff, since they involved transactions in a foreign country; that such question is not determined by any of the cases referred to by appellee in its petition to dismiss or affirm and it is a very important question; that the decision of the Circuit Court of Appeals for the Second Circuit, in *Zimmerman, et al. v. Hicks, et al.*, 7 F. (2d) 443, was in favor of the foreign bank and the court there applied not the pre-war rate of exchange, but the rate existing in December, 1921; that it would seem quite unfair to the appellant bank to have the writ dismissed without a

full opportunity to present its views on these important questions of law which affect so many other cases which are as yet undetermined; that it is not deemed necessary to then discuss the merits of the case or the other points raised in the brief for petitioner, because the reasons for applying for the writ were fully set forth in the petition for the writ and brief in support thereof; that a discussion of the full merits should be deferred until the case is reached in due course for hearing on the court's calendar; and, again, in a "supplemental memorandum filed in opposition to the motion to dismiss or affirm", that the *Zimmerman, et al. v. Hicks, et al.*, case, numbered 629 of the October Term Calendar, has not yet been reached for argument; and, finally, that the numerous questions of law involved in the case at bar were not disposed of by the decision on the narrow issues raised in the *Guinness* case.

And in its final brief just filed, petitioner bank has abandoned all previous contentions made up to this time; and, now contends for the sole proposition that there is a distinction to be made as to the date at which marks are to be reduced to American money for purposes of judgment, in the case at bar—an action to recover after demand for payment and refusal to pay the amount of respondent's deposit account with the petitioner bank in Germany and agreed to be paid there upon demand, and cases to recover damages for breach of contract occurring in German (Br. p. 3); and, furthermore, that the case at bar differs from the *Guinness* case (169 U. S. 71), also, in that the debt in marks in that case was to be paid in the United States, while in the case at bar the debt in marks was to be paid in Germany.

Petitioner now relies solely upon Assignment 11 (R. 54-55) which is that the decree is against law, in that it appears upon the face of the decree that the rate of exchange adopted for the conversion of marks into dollars was the rate of exchange prevailing between the United States and Germany on June 12, 1915 (date of demand by respondent and refusal by the bank to pay); this is entirely too general as an assignment; it is not sufficient in specific detail or particularity to properly raise the question urged. (Rule 8, 26 Sub. 4.)

Hubbard v. Tod, 171 U. S. 474; 43 L. Ed. 246;

Green v. Thomas, 211 U. S. 598; 53 L. Ed. 343;

Erie R. Co. v. Kirkendall, 266 U. S. 185; 69 L. Ed. 236;

Davis v. Currie, 266 U. S. 182; 69 L. Ed. 234;

Mo. P. R. Co. v. Hanna, 266 U. S. 184; 69 L. Ed. 235;

Furness Withy Co. v. Yang tse Ins. Assn., 242 U. S. 430; 61 L. Ed. 409;

U. S. v. Rimer, 220 U. S. 547; 55 L. Ed. 578;

Layne & Bowler Corp. v. Western Wells Wks., 261 U. S. 387; 67 L. Ed. 712;

Houston Oil Co. v. Goodrich, 245 U. S. 440; 62 L. Ed. 385;

Forsyth v. Hammond, 166 U. S. 506; 41 L. Ed. 1095;

So. Power Co. v. N. C. Public Service Co., 263 U. S. 508; 68 L. Ed. 413;

Second Russian Ins. Co. v. Miller, 268 U. S. 552; 69 L. Ed. 1088;

Alice State Bk. v. Houston Pasture Co., 247 U. S. 240; 62 L. Ed. 1096;

Hodges v. Snyder, 261 U. S. 600; 67 L. Ed. 819;
Del Pozo Y. Marcos v. Wilson Cypress Co., U. S. Supreme Ct. Advance Sheets, 70 L. Ed. 73;
Southeastern Express Co. v. Miller, 264 U. S. 541; 68 L. Ed. 840.

Furthermore, the questions on which the decision depends are so unsubstantial as not to need further argument; for *Guinness, et al. v. Hicks, et al.*, 269 U. S. 71, was just like the case at bar—an action to recover for a specific debt, as contra-distinguished from an action to collect damages for breach of contract or damages arising from tort—for an account stated in German marks; while the case at bar is to recover upon respondent's bank account, after demand by him for payment, and refusal to pay by the bank. And this court in this *Guinness* case applied the rate of exchange prevailing on the date the account stated became due, just as we are claiming here—that the rate of exchange prevailing when payment of the bank account was demanded and refused, June 12, 1915.

The other distinction contended for by petitioner, between the *Guinness* case and the case at bar, is that in the *Guinness* case the marks were to be paid in the United States, while in the case at bar they were to be paid in Germany. This is disposed of by the decision of this court in *Sutherland v. Mayer*, 70 L. Ed. U. S. Supreme Court Advance Sheets, at p. 581, where it is held, in quoting with approval from an English case, that the rule is the same, whether payable in this country or in a foreign country.

ARGUMENT.

In petitioner's brief it is contended that the date of judgment, rather than the date upon which respondent made his demand upon the bank for payment of his bank account, June 12, 1915, should be taken as the date for converting the mark account into American money for purpose of judgment. This is urged upon the theory that a distinction is to be made for such purpose between an action for what is termed a *specific debt*, like the case at bar, and an action for damages for breach of contract or for tort; and, upon the further theory that a distinction is to be made between the cases, when the debt is to be paid in foreign money in a foreign country and when the debt is to be paid in this country, but payable in foreign money.

Counsel make these contentions, notwithstanding, *Guinness, et al. v. Hicks, et al.*, 269 U. S. 71, was, also an action for just such a specific debt as the case at bar, namely: an account stated in German marks; but counsel contend the decision of this court in the *Guinness* case is not authoritative, for the reason that in the opinion this court says that they were payable in this country, while in the case at bar they were payable in Germany; but, it seems to us that this court has already disposed of this last contention, also, in *Sutherland v. Mayer*, 70 L. Ed. p. 581, Supreme Ct. Adv. Opinions, where Mr. Justice Sutherland, quoting with approval from an English case (*Lebeaupin v. Crispin* (1920), 2 K. B. 715), held that in fixing the date when the liability to pay in foreign money "crystalized", the rule was the same, whether the obligation was to be performed in the country

where the action was brought or in the country where the obligation was incurred.

As authority for these contentions, counsel relies upon two Federal District Court cases, *Liberty National Bank v. Burr*, 270 Fed. 251 and *The Hurona*, 268 Fed. 910, and four very early state court cases (Br. p. 10), all of which are entirely discredited at the present time and entirely out of tune and accord with the great majority of the most recent state and federal court cases and the decisions of this court in *Guinness, et al. v. Hicks, et al.*, 269 U. S. 71, and *Sutherland v. Mayer*, 70 L. Ed. U. S. Adv. Sheets, p. 581; *Birge-Forbes Co. v. Heye*, 251 U. S. 317. Counsel also relies upon the English case. (*Societe des Hotels le Touquet Paris-Plage v. Cummings* (1922 C. A.), 1 K. B. 451.)

As we read the opinion in this English case the court did not pass upon the point in question, and this was expressly pointed out in the opinion, where, at page 456, it was said:

> "Under these circumstances the only material question for consideration is whether the plea of payment after action is established, and if established what the effect of it is."

and at page 458, it is said:

> "As the appellant has proved that she paid the amount of the debt, at the place at which, and in the currency in which, it was payable, and as the amount she paid was accepted and retained without protest or objection, I am of opinion that the plea that after action brought she satisfied the plaintiff's claim by payment was made out, and that judgment should have been entered for the plaintiffs for nominal damages only."

and again, one of the judges, Atkin, L. J., page 465, said:

> "For the purposes of this action, I have not thought it necessary to decide at what date the exchange should be calculated had the plaintiff succeeded."

But the very point urged by the bank's counsel, though, was fully discussed in this very same English case, as reported, 3 K. B. 459 (1921); and the very distinction sought to be made by counsel between actions for debt and for breach of contract, was discussed at some length and disposed of against counsel's contention. The opinion in this case, as found in 3 K. B. 459, is cited with approval by this court in *Sutherland v. Mayer,* 70 L. Ed. 581, and is also cited with approval by Judge Rose, of the U. S. Maryland District Court, in *Page v. Levenson,* 281 Fed. pp. 556-557, a splendidly reasoned case, which was an action to recover the price of certain French merchandise to be delivered in France to an American citizen for which he agreed to pay in France, in French money. This same English case, as reported in 3 K. B. 459, is also cited with approval by Judge Learned Hand in the case of *Guinness v. Miller,* 291 Fed. p. 770, the same case which was before this court as *Guinness, et al. v. Hicks, et al.,* 269 U. S. 71. In this decision, Judge Hand, in far abler language than we are able to express, fully disposed of the argument of counsel. (Br. pp. 3-5.)

Later English cases uphold the doctrine laid down by the opinion in this case as reported 3 K. B. 459, namely:

Pyrae v. Wilkinson, 2 K. B. 166 (1924),

an action for debt arising in and payable in a country foreign to England, and

Uliendahl v. Parkhurst Wright & Co. (1923), W. N. Eng. 224-39 Times L. R. 628; 67 Sol. Jo. 701; 58 L. J. N. C. 513; 156 L. T. Jo. 341,

an action in England for debt and payable abroad.

As we have just pointed out, this court, in the two cases which seem to us are authoritative and controlling here, *Guinness et al. v. Hicks, et al.*, supra and *Sutherland v. Mayer*, supra, apparently made no such distinction as made by the bank's counsel between actions for strict debt, as he calls the case at bar, and actions for damages for breach of contract arising in a foreign country and actions for damages for torts committed abroad; for in *Hicks, et al. v. Guinness, et al.*, which like the case at bar was to recover for a specific debt, namely: upon an account stated, the opinion cites, indiscriminately cases of breach of contract and cases to recover upon specific debts and where the causes of action arose abroad; and in *Sutherland v. Mayer*, where this court was called upon to fix the date for converting marks into American money, for purposes of the judgment, in an accounting suit between American and German partners, Mr. Justice Sutherland cited with approval cases of damages for breach of contract and this case 3 K. B. p. 459, an action to recover for what counsel calls a strict debt.

In this opinion Mr. Justice Sutherland, also, held that in fixing the date when the liability to pay in foreign money "crystalized", the rule was the same, whether the contract was to be performed in the country where the action was brought or in the country where the obligation matured and he said in this connection. (p. 581):

> "And the rule is the same whether the contract is to be performed in England or out of England, on the ground that there should not be varying rules in such cases. Lebeaupin v. Crispin, supra, p. 723 ((1920), 2 K. B. 714.)"

To the argument of the bank's counsel (Br. pp. 4-5) as to the hardships visited upon the bank, by applying the date of demand and refusal to pay (June 12, 1915), as the date for converting the marks into American money, a very clear answer is given by the Circuit Court of Appeals of the District Court of Columbia, in *Dante v. Miniggio*, 298 Fed. at 847, C. C. App. D. C.—an action for debt for a stated number of francs.

> "In answer to the argument advanced by appellant that, had he, prior to the bringing of suit, tendered the number of francs due he would have liquidated his obligation, it already has been suggested that he did not make such a tender, so that he is solely responsible for the situation in which he now finds himself. The question has been so thoroughly considered in the cases cited that further discussion is unnecessary."

There is really nothing which we can add to what has already been said in the most recent opinions of this court and those of the Federal and District Courts and Circuit Courts of Appeal and the State courts upon the subject, and which have disposed of all of the arguments advanced by the bank's counsel. These cases have no doubt been fully presented to this court in this class of cases which have recently been submitted, and were fully considered by the court in the *Guinness* case, supra, and the *Sutherland v. Mayer*, case, supra. We therefore feel justified in simply referring to these cases without further comment or discussion:

Guinness, et al. v. Hicks, et al., 269 U. S. p. 79;

Guinness v. Miller, 291 Fed. 769; s. c. 299 Fed. 538;

Sutherland v. Mayer, 70 L. Ed. p. 574, U. S. Supreme Court Advance Opinions;

Birge-Forbes Co. v. Heye, 251 U. S. 317; 64 L. Ed. 286; s. c. 248 Fed. 640; 160 C. C. A. 536;

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Simonoff v. Granite City Nat. Bk., 279 Ill. 248; 116 N. E. 636;

Butler v. Merchant (Tex. Civ. App.), 27 S. W. 193;

Katcher v. Am. Express Co., 94 N. J. Law 165; 109 Atl. 741;

Columbia Law Review, Mar. 1922;

Wormser Bros. v. G. Monoquin & Co., 249 Fed. 428;

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The Celia v. The Volturno, House of Lords 2 A. C. 544; 20 A. L. R. 884;

11 *A. L. R.* 363;

20 *A. L. R.* 899;

30 *A. L. R.* 1285;

43 *A. L. R.* 520;

Societe des Hotels le Touquet Paris-Plage v. Cummings (1921), 3 K. B. 459;

Cash v. Kennion, 11 Ves. 314;

Pyrae v. Wilkinson, 2 K. B. 166 (1924);

Uliendahl v. Parkhurst W. & Co. (1923), W. N. Eng. 224; 39 Times L. R. 628; 67 Sol. Jo. 791; 58 L. J. N. C. 513; 156 L. J. Jo. 341;

Wichita Mill & Electric Co. v. Naamlooze, etc., 3 Fed. (2d) 931;

Re British American Continental Bank (1922), 2 Ch. 575;

Lebeaupin v. Crispin (1920), 2 K. B. 714.

The foregoing authorities demonstrate pretty clearly that at the present date, neither in America nor in England is there any distinction to be made between a cause of action for a debt payable abroad, such as the case at bar, or payable in this country, if payable in foreign money; nor is there any difference between cases in damages for breach of contract abroad and actions to recover upon debt in foreign money, whether by contract payable abroad or payable in this country.

It is true that had plaintiff sued in Germany he could have recovered only the specific amount of his mark account but he had a right to sue in this country and is not responsible for the depreciation of the German mark. No one, other than the defendant, is responsible and he is responsible solely by reason of his failure to pay upon demand when made on June 12, 1915, as pointed out in the *Minniggio* case, supra. Plaintiff is asking and the lower courts have given him only what the law as it is plainly written and established by precedent and principle and common sense gives. It is really the German Bank,

if anyone, who is asking special favors and privileges. It is asking the right to take and hold all money of plaintiff which came its way. It received these marks at a time when they were of a substantial value; it used them either in its business or in a speculative way and has had the benefit from their use.

True, it is, as asserted by counsel, the function of this court to enforce only the contract as the parties made it, but the bank by its refusal to pay and by having funds in this jurisdiction entitles plaintiff to sue here and the courts of this forum cannot do what counsel would have them do—render a judgment expressed in German marks; plaintiff was entitled to have these marks, as demanded on June 12, 1915; the judgment only gives plaintiff what he was on that date entitled to. Carried to its logical conclusion, counsel's argument would permit defendant to take advantage of his own wrong; it refused to pay plaintiff these marks on June 12, 1915, as demanded, and when it was afforded a full opportunity to pay them, it chose not to do so; but to hold them and keep them for its own use and it now desires to pay plaintiff the number of these marks at such a depreciated value in American money, as expressed by Mr. Justice Sutherland, in *Sutherland v. Mayer*, as "to indulge in a pure fiction". It is only an imaginary hardship upon defendant bank as pictured by its counsel; it did not receive depreciated marks, why should plaintiff be compelled to receive such?

The rate of exchange prevailing at the time the duty to discharge the obligation to pay is not taken for the purpose of using it as an element of damage, as counsel seem to think (Br. pp. 6-7); but, simply, because that is the date upon which the liability to pay becomes absolute

(*Hicks, et al. v. Guinness, et al.*, supra); the date when the liability "crystalized" (*Sutherland v. Mayer*, supra), and when plaintiff was entitled to his marks in Germany; and, the intent of the judgment in this country is simply to express in American dollars, as nearly as practicable, the value of such marks in Germany as of the date when they should have been paid.

The bank makes no offer at any time, by pleading or otherwise, to pay plaintiff anything or to assist plaintiff in reducing his demand and saving plaintiff loss of interest upon his money. It has and is contesting throughout every point and the character of the argument presented in all of the courts is indicative of the vigorous determination to at all hazards and at all times prevent, if humanly possible, the recovery of one penny or one mark by plaintiff.

We take it that the matter interjected into this case outside of the record (Br. pp. 10-16) as to proceedings before the mixed claims commission will have no effect upon this court at arriving at its conclusion. For purposes of this suit none of us are concerned with the procedure. The claim has not been paid or considered.

The letters purporting to have passed between the representative of the German Government and the representative of the United States are in no way made a part of the record. The purported transactions referred to (Appendix 1 to Counsel's Brief) purport to have taken place in February, 1925; the judgment was entered in this case on April 8, 1924 (R. 17-18); all that the record shows is that plaintiff's claim was only presented to the Secretary of State—not to any Mixed Claims Commission (R. 41-44); the point has never previously been made,

either in the trial court, the Circuit Court of Appeals or in the petition for the writ; nor is there any assignment of error whatsoever presenting such a point (R. 50-55).

CONCLUSION.

In conclusion, we respectfully submit that both of the lower courts adopted the correct date for reducing the marks into American money for purposes of judgment, namely: June 12, 1915; that the writ should be dismissed; or, else, the judgment of the Circuit Court of Appeals be affirmed.

Dated, San Francisco,
September 28, 1926.

Respectfully submitted,

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN B. ZIMDARS,
Counsel for Respondent.

In the Supreme Court

OF THE

United States

Office Supreme Court,
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WM. R. STANSB
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OCTOBER TERM, 1925

No. [redacted]224

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),

Petitioners,
(Defendants-Appellants),

vs.

CHARLES FRANKLIN HUMPHREY,

Respondent,
(Plaintiff-Appellee).

BRIEF OF RESPONDENT (PLAINTIFF-APPELLEE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM P. HUBBARD,
Mills Building, San Francisco,
GRANT & ZIMDARS,
Hobart Building, San Francisco.
Solicitors for Respondent
(Plaintiff-Appellee).

PERRAY-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

October Term, 1925

No. 764

Thomas W. Miller, as Alien Property Custodian for the United States of America, Frank White, as Treasurer of the United States of America, and Die Deutsche Bank Filiale Nurnberg (a corporation)

Petitioners,
(Defendants-Appellants),

vs.

Charles Franklin Humphrey,

Respondent,
(Plaintiff-Appellee).

BRIEF OF RESPONDENT (PLAINTIFF-APPELLEE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

REASONS URGED BY PETITIONER FOR WRIT.

Petitioner asserts, as reasons for asking a review of the decision of the Circuit Court of Appeals, Ninth Circuit, to practically quote from the petition and brief:

1. That the principal question of law in the case is whether the date of breach of contract—in the case at bar date of refusal by bank after demand by a depositor to pay—or date of judgment is to be taken as the date upon which is to be computed the rate of exchange in converting German marks into United States money for purposes of judgment; that there are two cases now pending before this court—*Guinness, et al. v. Hicks, et al.*, 299 Fed. Rep. 538 and 291 Fed. 768, and the case of *Zimmerman v. Hicks*, which involve the same question and which were brought here by writs of certiorari; that a conflict of authority exists in the lower courts and among the state courts as to whether the date of judgment or the date of breach of contract governs in computing the rate of exchange; that there are a number of other cases pending in the lower courts, involving the same question; that unless a writ of certiorari is granted by this court the decree of the Circuit Court of Appeals in this case will become final in advance of a full hearing and final determination by this court in these other cases; that the writ is desired in order that a uniform rule may be applied equitably to all cases, and in order that the final decision in the case at bar may accord with the final decisions of this court in the two cases just referred to and in order that execution may not be levied in the meantime; that the decisions of the lower courts of the United States and of the state courts are in hopeless conflict and the question has never been squarely presented to this court.

2. That the case at bar also involves certain questions relating to the relations of a bank to its depositors and the necessity for making a demand in order to mature the obligation, which questions it is asserted, are likewise in-

volved in the *Zimmerman* case; that the Circuit Court of Appeals found that a demand was made by the plaintiff on June 12th, 1915; and that it seems certain that no proper demand was ever made at any time of a character which would place a bank in default toward a depositor; that it also appears that certain of the amounts comprised within the judgment were deposited at a later date than the time of the demand and as to those items there is no evidence of any demand prior to the institution of the suit.

NONE OF ASSIGNED REASONS BRING CASE WITHIN REVISED RULES.

We have carefully read that portion of the revised rules of this court, effective July 1, 1925, which for guidance of counsel lay down the general character of reasons which will be considered by this court in granting a writ of certiorari to review a decision of the Circuit Court of Appeals in a case in which its decision is final (Revised Rules 35, Paragraph 5b) and find nothing in the decision of the Circuit Court of Appeals involved here and sought to be reviewed by certiorari falling with any of these reasons.

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals on the same matter.

The recent decisions of the United States and state courts, including California, New York, Illinois, New Jersey, hold that an indebtedness by a foreign subject to an American citizen upon an account payable, in foreign money, when recovery is had in a court of the United States, is to be measured by the value of the foreign

money as at the time the indebtedness was payable or time of breach of contract.

Guinness, et al. v. Miller, et al. (June 28, 1923), (U. S. D. Ct. S. D. N. Y.) 291 Fed. 769. Opinion by Judge Learned Hand, D. J. Same case affirmed by C. C. A. 299 Fed. 538 (2nd Circuit). (April, 1924);

Dante v. Miniggio, 298 Fed. 845; 33 A. L. R. 1278 (May 5, 1924);

Page v. Levenson, et al. (May 26, 1922), 281 Fed. 555 (U. S. D. Ct. Md.). Opinion by Judge Rose, D. J.;

Hoppe v. Russo-Asiatic, 235 N. Y. 37; 138 N. E. 497;

Cross v. Mendel, 157 N. Y. Supp. 357. Affirmed in 225 N. Y. 633-121 N. E. 871;

Birge-Forbes Co. v. Heye, 251 U. S. 317; 64 L. Ed. 286; same case, 248 Fed. 640; 160 C. C. A. 536;

Bissell v. Heywood, 96 U. S. 587; 24 L. Ed. 678;

Grunwald v. Freese, 4 Cal. Unrep. 182; 34 Pac. Rep. 73;

Simonoff v. Granite City Natl. Bank, 279 Ill. 248; 116 N. E. 636;

Butler v. Merchant (Tex. Civ. App.), 27 S. W. 193;

Katcher v. American Express Co., 94 N. J. Law 165; 109 Atl. 741;

Columbia Law Review, March, 1922; 33 A. L. R. 1285 (1924);

Wormser Bros. v. G. Morroquin & Co., 249 Fed. 428;

Zimmerman v. Miller, 2 Fed. (2d Series) p. 623.

The foregoing authorities are in full accord with the present English doctrine as applied both to contracts and

torts—that is, that the foreign money for purposes of judgment is to be reduced to the money of the forum, upon the basis of its value as of the time of breach of contract and when the money should have been paid (in the case at bar when demand was made for payment by plaintiff, June 12, 1915), and as to torts as at the date of the commission of the tort.

The English rule as to contracts, is pointed out in the following cases:

Di Ferdinando v. Smits & Co. (1920), 89 L. J. K. B. N. S. 1039;

11 *A. L. R.* 358 and notes of English and Am. cases;

33 *A. L. R.* p. 1286, and notes of more recent English and Am. cases (1924).

As to the English rule applicable to torts, the following are illustrative:

The Celia v. The Volturno (1921); House of Lords 2 A. C. 544;

20 *A. L. R.* 884, and notes of English and Am. cases.

2. The Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions. No local law is at all involved in the decision of the Circuit Court of Appeals.

3. The Circuit Court of Appeals has not decided an important question of general law in a way probably untenable or in conflict with the weight of authority. The modern rule as to exchange, as announced in the cases just referred to, are all uniform to the effect that the judgment is to be reduced to American money as of the

date of the breach of contract. There is no conflict in any of these decisions.

As to the question of demand, the holding of the Circuit Court of Appeals is that a sufficient demand was made; it decided simply as a question of fact from the evidence, that a sufficient demand had been made; it expressly recognized that a demand was necessary and held the evidence of such demand as a question of fact was sufficient. Certiorari will not be granted to review evidence and discuss specific facts. (*U. S. of America v. Johnston* (May, 1925), 69 L. Ed. Advance Sheets pp. 580-581.)

4. The decision did not decide an important question of federal law, which has not been but should be settled by this court. No question of federal law as contradistinguished from general law was involved.

5. Nor has it decided a federal question in a way probably in conflict with applicable decisions of this court.

6. The decision has not departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

In fact it has specifically followed in the line of the usual course of judicial proceedings and followed other Circuit Courts of Appeals upon this question.

The language of the Chief Justice with reference to granting petitions for writ of certiorari is appropriate here:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, to bring up cases involving questions of importance

which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co. v. De Spoturno Coty., 262 U. S. page 163; 67 L. Ed. page 924.

1st. All the decisions of the Circuit Courts of Appeals are now uniform upon this question, which is asserted by petitioner's counsel as the principal question of law involved—namely, the time at which the rate of exchange is to be converted into American money. They are unanimous in holding it is the date of breach of contract—in the case at bar—date of failure of the bank to pay after demand.

2nd. No question of such importance or of such public interest is involved as to require a decision by this court; since the decisions of the Circuit Courts of Appeals are uniform and harmonious upon the question and their decisions are made final in such cases as the case at bar.

STATEMENT.

This suit is by appellee as plaintiff, a citizen and resident of the Northern District of California, under Section 9 of the Trading with the Enemy Act (Comp. St. 1918, Sec. 3115½e; Fed. Stat. Supp. 1918, p. 858; Chap. 106, 40 Stat. at L. 411, 419) for judgment against defendant German Bank, for the aggregate sum of 78308.65 German marks, together with interest thereon, as a balance remaining to plaintiff's credit as a depositor of funds with

such bank, made by plaintiff while in Germany. Plaintiff seeks to have the judgment paid out of moneys of such bank, impounded in this country by the Alien Property Custodian, who, together with the United States Treasurer are made parties defendant to the litigation. The moneys were deposited by plaintiff in two separate accounts, one of which was in plaintiff's and his wife's name and subject to the order of either; the other was in the name of his two minor sons, but subject only to his order and in the event of his death, to the order of his wife. It is sought to have the marks for which judgment is rendered reduced to American money as of the date of the demand for payment of the two accounts and refusal to pay by the bank, found by the court to be June 12, 1915.

The suit was tried upon a stipulation of facts and certain oral testimony of plaintiff and the written waivers and assignments by the two boys to plaintiff (R. 35-77). The bank entered a general appearance and answer. It denied the indebtedness, as alleged, and set up in the answer that the complaint was insufficient in not alleging demand for payment and in addition pleaded as an affirmative defense that no demand had ever been made upon it; pleaded that plaintiff's wife should have been made a party defendant; and, finally, that the Southern Division of the District Court, for the Northern District of California, did not have jurisdiction of the action, but that jurisdiction was solely in the District of Columbia, since the *res*—the money of the defendant bank impounded by the Alien Property Custodian was situate in the District of Columbia. The Alien Property Custodian and the United States Treasurer simply entered general appearances and answered making formal denials; neither par-

ticipated in the trial, nor in the hearing before the Circuit Court of Appeals. The defendant bank never presented, nor urged in the lower court as a question of pleading the objection set forth in its answer as to the failure of the complaint to allege demand; nor did it present or urge in any manner the question of jurisdiction of the District Court of this district; furthermore, when plaintiff, who was the only witness produced by either plaintiff or defendants upon the question of demand, was testifying, no objection whatever was made to his testimony of demand as to its relevancy, competency, or materiality or that no demand had been pleaded in plaintiff's complaint. The subject of demand was treated by the defendant bank as a proper issue in the case and was so recognized by court and counsel throughout without question. Decree was entered in favor of plaintiff and against the bank for $11,440.27, which was arrived at by reducing 41,897.40 German marks to ~~Americas~~ money, as of June 12, 1915, the date the court found plaintiff had made demand upon the bank for payment of the moneys represented by the two accounts. The decree further directed that the amount awarded plaintiff be paid him from funds under the control of and in possession of the defendants Alien Property Custodian and the United States Treasurer. At the time demand was made four German marks were worth 82½¢ of American money. The decree included the interest allowed by the court at the rate agreed upon by plaintiff and the bank up to our entry into the War, April 6, 1917, and from the time the War ceased, July 3, 1919, at the rate prescribed by the laws of California, 7%; it was entered April 8, 1924.

THE BANK'S CONTENTIONS ON THE TRIAL.

The only questions raised by defendant bank upon the trial in the lower court, were:

1. That the account standing in the names of plaintiff's two minor sons was not involved within the issues, as made by the amended complaint and the bank's answer. This contention was made notwithstanding the amount claimed in the amended complaint, 78,308.65 marks, aggregated the total of the two accounts, and both accounts, that is the one in plaintiff's and his wife's names was subject to the order of either plaintiff or his wife and the account in the names of his two minor sons was also subject to plaintiff's order and in the event of his death, to the order of his wife, but in no event subject to the order of the boys at any time; and notwithstanding the bank rendered a statement addressed to plaintiff, February 3, 1915, before the demand was made by plaintiff, June 12, 1915, showing both accounts in the one statement as plaintiff's money, and the agreed statement of facts recites that the money which went into both accounts was plaintiff's money at the time the same was deposited.

2. That plaintiff had no right to recover upon this account standing in the name of the two boys, without their presence as parties to the suit.

3. That plaintiff's testimony, which was all the evidence produced by either side upon the question of demand, was insufficient to establish a demand.

4. That after the demand plaintiff wrote letters to the bank and permitted the bank to credit his account with interest and coupons upon bonds in the custody of the

bank at the time of the demand and the bank received one deposit from plaintiff subsequent to the demand.

5. That any judgment should reduce the German marks to American dollars as of their value at the time of trial —not at the time of demand.

6. That no interest should be allowed plaintiff, other than such as was fixed by the contract with the bank, and that, only up to the time the funds were taken over by the German Alien Property Custodian (June 20, 1917), the court having fixed and allowed interest to the plaintiff according to the contract with the bank up to the time of the beginning of the War between America and Germany, April 6, 1917, and after the cessation of the War between Germany and America (July 3, 1919), interest at the rate of the forum, 7%.

DISPOSITION BY THE DISTRICT COURT OF MATTERS PRESENTED.

The lower court prepared a memorandum opinion (R. 27-28) and found that the money in both accounts was at all times plaintiff's money and was recognized by defendant bank as such and that plaintiff was entitled to recover upon both accounts; that demand had been made by plaintiff upon the bank for payment about June 12, 1915, and that in view of the reasons assigned by the bank's official for refusal to pay, it would have been utterly *futile to make "a more definite and positive demand"* (R. 28); that the value of the German marks, reduced to American money for purpose of expressing the judgment in American money, should be determined as of the time of breach of duty to pay or accrual of cause of action (June

12, 1915, date of demand), and that plaintiff should recover interest from the time of our entry into the War (April 6, 1917), at the rate agreed upon by plaintiff and the bank and from the time of the cessation of the War (July 3, 1919), at the rate of the forum (California), 7%. The decree directed the payment of the amount found due from the bank to plaintiff out of the funds of $34,508.13 as moneys belonging to the defendant bank, which had been impounded by the Alien Property Custodian and were in the possession of the Alien Property Custodian and the United States Treasurer.

Defendant bank in due time filed and presented a petition for rehearing, urging insufficiency of the evidence to justify the decision and decree, and as an additional ground a desire to obtain what it termed "newly discovered evidence", namely: the testimony in Germany of certain of the German Bank officials, upon the question of whether a demand had been made by plaintiff upon the bank, as testified to by him. No attempt having at any time previously been made in all the period between the filing of its answer, June 12, 1922, and the time of the trial, January 18, 1924, to obtain any testimony upon the issue of demand as raised by its answer. The judge of the lower court denied the rehearing and prepared a memorandum opinion (R. 33-34).

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

Though petitioner bank did file in the Circuit Court of Appeals the specifications of error set forth in the record (R. 85-94), yet neither upon the oral argument nor in the brief in the Circuit Court of Appeals was any reference

made to the line of argument presented on page 16, of petitioner's brief, as follows:

> "It also appears, however, that certain of the amounts comprised within the judgment were deposited at a later date (R. 56-67) and as to those items there is no evidence of any demand whatever prior to the institution of the suit."

No matters were presented to the Circuit Court of Appeals either by brief or oral argument, save and except those particular matters which were in detail specifically disposed of by the opinion of the Circuit Court of Appeals. All other matters specially assigned as errors were entirely abandoned and not pressed either in oral argument or by brief in the Circuit Court of Appeals—hence, the opinion of the Circuit Court of Appeals did not deal with them at all. The opinion of the Circuit Court of Appeals disposed of every point made by the bank's counsel.

Matters urged as errors in the assignment of errors but not presented in the briefs will not be considered.

Loomis v. Wattles, 266 Fed. 876;

Saalfield Pub. Co. et al. v. G. & C. Merriam Co., 238 Fed. 1;

Consl. Interstate Callahan M. Co. v. Witkauski, 249 Fed. 833;

Arkansas Short Leaf L. Co. v. Hembr, 281 Fed. 914.

In the brief of the bank's attorney, filed in the Circuit Court of Appeals, appears the following (pages 11 to 12):

> "(1) As to the joint account, a question of fact, with its legal implication, will be presented, namely: that no demand for the closing of the joint account and the withdrawal of the amount therein credited as balance, was made upon the bank by any author-

ized person, or in any authorized mode, or at all; and by legal consequence, no cause of action against the bank accrued to this claimant.

(2) The absence of this essential demand will also be presented in respect to the account of James Warren Humphrey and John Charles Humphrey; and herein, the absence of any authorized or competent representative of the depositors will be noted.

(3) Assuming that any recovery in the pending suit is admissible on the evidence and the law, it would still remain, and the question will, therefore, be presented—an important and interesting one—that the rate of exchange, as between American dollars and German marks, should be ascertained and applied as of the time of trial and judgment; not as of the time of any alleged demand upon the bank, if such demand could be successfully protested.

"Assignment of Errors.

"The assignment of errors will be found at pages 85-94 of the Record. As usually happens, there is a good deal of particularity in the assignment made. It is believed that the questions to be made on this appeal are gathered up in the three principal inquiries, suggested at the close of the foregoing statement of the case. We may be permitted, then, to dispense with any more detailed repetition of the assignment of errors." (Brief of defendant bank, page 12.)

FOREIGN MONEY IS TO BE REDUCED TO AMERICAN MONEY OF THE VALUE AS AT TIME OF BREACH OF CONTRACT.

1. As just pointed out, all of the decisions of the United States Circuit Courts of Appeals and all modern decisions of the highest courts of the states, including California, Illinois, New Jersey and New York, are to the effect that the indebtedness of a foreign subject to an American citizen upon an account payable in foreign money when

recovery is had in a court of the United States is to be measured by the value of the foreign money as at the time the indebtedness was payable or time of breach of contract. This principle was applied by the Circuit Court of Appeals of the Ninth Circuit, in this case; thus, following every other Circuit Court of Appeals where the question has been presented and the highest courts of each of the states upon the matter. There is no conflict to reconcile herein; no necessity nor occasion for this court to interpose. There is nothing of such public interest as to justify the decision of this court upon this question, since all the Circuit Courts are following along the same line of decision.

We have not had an opportunity to examine the petitions for writs of certiorari in the two cases referred to by petitioner's counsel—the *Guinness* and the *Zimmermann* cases, nor have we been able to find a report of the opinion of the Circuit Court of Appeals in the *Zimmermann* case. We have, however, examined the opinion of the Circuit Court of Appeals in the *Guinness* case (299 Fed. 538) and find that there was a further question, a federal question, involved in that case other than the one as to the time at which foreign money is to be measured in money of the United States. This other question was as to the effect of the treaty with Germany upon the rate of exchange or interest. That question is not involved at all here; has never been raised by the bank at any stage of this case; and for all that we know may have materially influenced this court in granting the writ in that case. We also notice that in the *Guinness* case, the Solicitor General also petitioned for the writ of certiorari and there was no appearance for respondents; while in

the case at bar neither the United States District Attorney nor the Attorney General took any interest or part in the proceedings in the District Court or in the Circuit Court of Appeals; nor are they participating at all in this petition.

In the opinion of the District Court in the *Zimmerman* case, 2 Fed. (2nd Series) 623, there were many questions other than the one particularly involved here; as far as we are able to determine without the petition before us, some of these questions may have also influenced this court in granting the petition in that case.

As previously pointed out, there is no conflict at all in any of the decisions of the Circuit Courts of Appeals and the opinions of the highest courts of the several states upon this particular question. The decision of the Circuit Court of Appeals in this case is by law made final. It is in full accord with the most recent decisions of all the Circuit Courts of Appeals. We take it that unless this court is fully convinced that the conclusion arrived at by the Ninth Circuit, is clearly erroneous it will find no occasion to review this case and thereby prevent for several years longer plaintiff from obtaining his money, after he has obtained the judgment of the Circuit Court of Appeals, simply because there may be other cases in this court which may incidentally involve among other questions, this same particular question. Respondent has already been kept out of his money by this bank for ten years.

It is of no moment that there may possibly be a number of other cases pending in the lower courts involving the same question. No doubt the Circuit Courts of Appeals,

in which such cases are pending, will apply the same uniform rule as have all these other Circuit Courts of Appeals; respondent should not be compelled to await the decisions in all these cases, simply because they happen to involve the same question; nor should respondent be further prevented from collecting his money, simply because petitioner bank asserts it desires to have this court adopt a uniform rule applicable to all cases involving a similar question, since the Circuit Courts of Appeals are uniformly disposing of all such cases as they arise. No doubt petitioner bank would like very much to hold respondent's money for another ten years and until all these pending cases and such others as may arise in the future can be finally passed upon by this court; but we do not understand that the question is of such public interest or general importance as to justify such action by this court; especially since the decisions of the Circuit Courts of Appeals are made final in this class of cases.

THE CIRCUIT COURT OF APPEALS HELD THAT SUFFICIENT DEMAND WAS MADE.

2. As to the contention of petitioner that the case at bar involves certain questions relating to the relations of a bank and its depositors and the necessity for making of a demand in order to mature the obligation, which questions it is asserted are likewise involved in the *Zimmermann* case, and that the Circuit Court of Appeals found that a demand was made by the plaintiff on June 12, 1915, and that without going into the details of the evidence, it seems to petitioner certain that no proper demand was ever made at any time of a character which

would place a bank in default toward a depositor; that it also appears that certain of the amounts comprised within the judgment were deposited at a later date than the time of the demand and as to those items there is no evidence of any demand prior to the institution of the suit. The opinion of the Circuit Court of Appeals upon the question of demand is as follows (111-112):

> "The substance of Humphrey's testimony was that in August, and November, 1914, and about June 12, 1915, he made a demand for the payment of the whole sums represented in the several accounts; that a director in charge of the bank told him that a moratorium had been declared and that he could have the usual amounts that he had been accustomed to use, but not the total sum represented by the accounts. Humphrey said that after June 12, 1915, he had deposited coupons on German bonds and dividends on the bank's shares. He could not recall all the different conversations with the bank officials, but testified that in August, 1914, the bank officials looked up his accounts, asked how much he had used, and told him that he should not take any securities out of Germany; that after the August demand he had left certain German and Hungarian securities in the bank for collection. Defendant bank made no objection of any kind to the testimony of plaintiff, and called no officer or representative of the bank to refute what Humphrey said. The bank, however, endeavors to break the force of Humphrey's evidence by reference to certain correspondence between Humphrey and the bank."

And after reviewing the contention of counsel for the bank that certain letters showed a waiver of the demand the opinion follows (R. 113):

> "We attach no significance to the fact that Humphrey's demand was oral. The bank having told the depositor that it availed itself of the privilege which usually goes with a moratorium, should

> not now be heard to say that because the demand was not in writing it can avoid recognition of the obligation."

The record fully justifies the conclusion of the Circuit Court of Appeals. (R. 61-70.)

Plaintiff's testimony as to demand all went in without objection of any kind from the bank's attorney, that the testimony was either immaterial, incompetent or irrelevant or was not the best evidence. In fact, no objection whatsoever was urged to the character of the demand or as to the testimony as to the demand (R. 66-70).

The objection as to the demand being oral rather than in writing, was neither presented nor urged in the lower court in any manner whatsoever.

A depositor can demand his money without a written order.

5 *Cyc.* p. 527 and note 34 and cases.

While presentation of a check is the usual method by which a customer demands payment of money deposited in a bank, formal demand is not essential to a recovery, where the payment is refused on other grounds.

> "It is a general rule that where it is manifest that a demand would have been wholly futile if made, it is unnecessary to go through the formality of making it."
>
> *Altman et al. v. Phillips County Bank*, 86 Kan. 930.
>
> 122 *Pac. Rep.* 874 at 875.
>
> 8 *A. L. R.* 175.

It is to be remembered that the officer of the bank upon whom plaintiff made his demand, refused it upon the broad ground that the bank was resting upon its privilege

of invoking the moratorium (R. 67). It is quite clear, therefore, that the presentation of a formal written demand would have met with the same fate, had it been presented by plaintiff, as his oral demand.

Among things said to constitute waiver of demand are notification to the depositor by the bank that his claim will not be paid.

Moss on "Banks and Banking", Vol. I, 5th Ed., Sec. 322, p. 602.

Plaintiff testified:

> "The bank stated to me that on the 5th there was a moratorium and that I could have the usual amounts that I had been accustomed to use" (R. 67).
>
> "They looked at my account and saw I was getting about so much or asked be how much I had used and also told me that I should not take any securities from Germany" (R. 69).

It is apparent that the refusal was not placed upon the ground that the demand was not made in writing and even had a written demand been made, payment would likewise have been refused. Under such circumstances defendant bank cannot be heard to say the demand was not in writing.

As to the contention that it appears certain of the accounts comprised within the judgment were deposited at a later date than the time of the demand and as to those items there is no evidence of any demand prior to the institution of the suit;—as heretofore pointed out in the statement of facts, notwithstanding the assignment of errors specified some such matters, neither in the oral argument nor in the briefs were these matters urged upon the Circuit Court of Appeals and that court in

detail specifically disposed of each and every point urged. Aside from the foregoing, though, the record shows the following:

The account in the name of plaintiff and his wife (R. 46-47) on the "*credit side*" shows no entries after June 12, 1915, except very small items for "postage and charges" and one payment of 718.06 marks, which evidently was in accord with what the bank official informed plaintiff, namely, that he could withdraw only about the same sums as had been previously withdrawn (R. 69-70). On the "*debit side*" this same account after June 12, 1915, has one item of transmittal from the German Bank at Berlin 237.90 marks and all other entries simply credits for interest on the account and credit for coupons collected; evidently the coupons upon bonds which were in its possession when plaintiff made his demand (R. 70).

The account was finally closed on June 29, 1917, by payment to the German Custodian (R. 47).

The other account in the name of the two boys (R. 48-49) on the "*credit side*" shows on June 12, 1915, the charge of this 41,000 marks referred to in the letter of June 12, 1915 (R. 55), about which counsel attempt to make so much, and which, as the letter shows, was a transaction with this Coptoir de Escompte de Geneva as of a date evidently prior to June 12, 1915; and all the defendant bank did was to charge on that day, June 12, 1915, plaintiff's account with this 41,000 marks previous transaction, as per the letter, defendant bank had received that day, June 12, 1915, from this Comptoir de Escompte de Geneva. Aside from this entry there are no other items on this "credit side," except as the

account is charged with interest items added to the other "debit side" of the account. On the "debit side" are only credits for interest.

This account was likewise closed by payment to the German Alien Property Custodian June 30, 1917.

A significant fact with reference to the conduct of the parties subsequent to June 12, 1915, is that in neither of these two accounts do any entries appear of the marks referred to in the only letters written by plaintiff to the bank after June 12, 1915, concerning deposits made by him after that date. These are the letters of August 5, 1915 (R. pp. 9-60); and that of January 26, 1916 (R. p. 56).

The record does not present a case of no demand made upon the bank as asserted in the petition (p. 4). It presents the case of a *specific* demand having been made by plaintiff and which the District Court and the Circuit Court of Appeals both held amply sufficient under the circumstances. As pointed out above, there are none of the conditions existent in this case which are set forth in the revised rules of this court as special reasons why petitions for writs of certiorari should be granted.

Were this court to devote its time in attempting to reconcile all of the decisions of all the United States District Courts and the decisions of all the state courts with the decisions of this court and those of the Circuit Courts of Appeals, it would have but little, if any, time left for the real business of the court.

As a practical proposition, if respondent's judgment is to be paid upon the basis of the depreciated value of the mark in American money at the time of judgment (April,

1924) as contended for by petitioner bank, it would have been just as well that the judgment should have been in favor of petitioner; for, expressed in dollars and cents, it would have been insignificant in amount.

We, respectfully, submit that there is no reason whatsoever presented in the petition why this court should disturb or interfere with the decision of the Circuit Court of Appeals, which by law is made final in this case.

Dated, San Francisco,
October 26, 1925.

Respectfully submitted,
WILLIAM P. HUBBARD,
Wm. GRANT & ~~ZEMDARS,~~
Solicitors for Respondent
(Plaintiff-Appellee).

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 764

THOMAS W. MILLER, as Alien Property Custodian for the United States of America, FRANK WHITE, as Treasurer of the United States of America, and DIE DEUTSCHE BANK FILIALE NURNBERG (a corporation),
Petitioners.
(Defendants-Appellants),

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent,
(Plaintiff-Appellee).

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
City and County of San Francisco.—ss.

WILLIAM P. HUBBARD, being duly sworn, deposes and says: That he is a citizen of the United States and resident of the City and County of San Francisco, and is one of the solicitors for respondent in the above en-

titled matter; that he received a copy of the transcript of record and copy of petition for writ of certiorari and brief of petitioners in the above entitled matter, at his office in the City and County of San Francisco, State of California, on October 13, 1925; that on October, 26, 1925, affiant deposited a copy of the foregoing brief of respondent (plaintiff-appellee) in opposition to petition for writ of certiorari, in the Post Office at the City and County of San Francisco, State of California, properly enclosed in a sealed envelope, addressed to Messrs. Peaslee, Brigham and Gennert, solicitors for petitioners, at their place of business, No. 501 Fifth Avenue, in the City of New York, State of New York, and caused the same to be registered by the Post Office Department of the United States Government at said City and County of San Francisco, and prepaid the postage thereon; that there is a United States Post Office at the City and County of San Francisco, State of California, and also one at the City of New York, and between said two places there is a regular daily communication by mail.

WILLIAM P. HUBBARD.

Subscribed and sworn to before me this 26th day of October, 1925.

(Seal) Flora Hall,

Notary Public in and for the City and County of San Francisco, State of California.

FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 7[redacted]224

Summary Docket No. 224

DIE DEUTSCHE BANK FILIALE NURNBERG,
Petitioner,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

WILLIAM P. HUBBARD,
Mills Building, San Francisco.
WILLIAM GRANT,
JOHN B. ZIMDARS,
Hobart Building, San Francisco.
Counsel for Respondent and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 764

Summary Docket No. 224

DIE DEUTSCHE BANK FILIALE NUENBERG,
Petitioner,

vs.

CHARLES FRANKLIN HUMPHREY,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Charles Franklin Humphrey, respondent herein, respectfully petitions this court for a rehearing, and in that behalf respectfully shows:

The majority opinion holds that German marks must be reduced to American money, for purpose of the Amer-

ican judgment, as of their value, at the beginning of the suit (July 9, 1921); while both the lower courts and the minority opinion, and, what appears to be the great weight of authority, both in England and in this country, inclusive of all the federal and state courts, hold that the breach date (June 12, 1915), when demand was made by respondent for payment and the German bank refused to make such payment, is the proper date.

The majority opinion arrives at its conclusion, upon what seems to us, to be clearly, a false premise, in assuming that *the obligation* enforced by the lower courts and the minority opinion, and the great weight of both English and American law, is a *different* or *greater obligation* than the *obligation* which would have been enforced in the German courts, had respondent resorted to those courts rather than to our courts; and, this false premise is based exclusively upon the fact that the German marks just happened incidentally to be worth more on the breach date (June 12, 1915), the date taken by the lower courts and the minority opinion for reducing these marks to American money, than was their value *at the time suit was brought* (July 9, 1921)—the date which the majority opinion holds is the date for reducing them to American money for purpose of the judgment. This false premise runs throughout the whole majority opinion; and, to our mind, is the reason for the majority opinion putting this court on record as just contrary to, and in the very teeth of, what we humbly believe it has just decided in the two important, thoroughly argued and reasoned cases of *Hicks v. Guinness*, 269 U. S. 71, and *Sutherland v. Mayer*, (May 24, 1926) 70 L. Ed. U. S. advance Sheets, 581; and also out of tune, so to speak, with what is the great weight

of both American and English law, founded upon what seems to be fundamental reason, logic and justice; and this rule stabilizes upon a fundamental principle, a proposition of law, which, if fixed as, of other than as of the breach date, leads to vaccilating chaos; and will not be founded upon any real underlying principle; but will lead to endless confusion and anomalous situations, as we hope to shortly point out.

Let us assume that instead of marks being worth more on June 12, 1925, the breach date, than they were worth at the time suit was brought, July 9, 1921, they just happened to be worth less on such breach date, where would the argument advanced to support the majority opinion's conclusion that because the marks were reduced to American money as of the breach date, rather than the date of bringing suit, the lower courts were imposing upon the German bank a greater liability and obligation than such as existed on the breach date, lead us? The very asking of this question to our mind shows the fallacy of the argument upon which the majority opinion is based; for if we are correct in our statement that the so-called *greater obligation* used as a basis for the majority opinion's holding that a greater obligation was cast upon the German bank by the decision of the lower courts and by the holding of the minority opinion than existed in Germany at the time of the demand and refusal—the breach date—had plaintiff resorted to the German courts rather than to our courts; then it logically follows that the whole argument of the majority opinion in support of its holding that the obligation enforced by the lower court, created such greater obligation, must be specious.

For example, suppose another person had deposited the same number of German marks in the same German bank at the same time as did respondent; suppose this other depositor made his demand on the same day as did respondent; suppose this same other party and this same German bank had at the same time refused to pay this other party his deposit; and this same other party had instituted his suit in the same Federal District Court in California as did respondent, but instead of suing on July 9, 1921, as did respondent, this other party had sued at either an earlier or a later date, and when German marks happened to be of a greater value than they were on the date on which respondent sued; then, according to the reasoning of the majority opinion, this other party would have his judgment for a sum based upon such greater value of this same number of German marks; and this, too, even though no statute of limitations or laches was invoked against respondent. It would simply be because this other party had sued at a different date from that upon which plaintiff sued. It seems to us that the majority opinion does just exactly what it says the law takes no account of, viz.: the risk of currency fluctuations, and as to whether the creditor or debtor profits by the change, for it is the very change or fluctuation in the value of the foreign currency which induces the majority opinion to assume that a greater obligation was enforced by taking the breach date than the date of bringing suit.

In support of this assertion that the *obligation* or *liability* against the defendant German bank, as enforced by the decree of the lower court, and as justified by the minority opinion in reducing the German marks to American dollars, as of June 12, 1915—the breach date; rather

than the date of bringing suit—July 9, 1921,—constituted and was an *additional liability* or *additional obligation* or *greater obligation*, imposed upon the German bank than existed in Germany at the time of the breach of its contract on June 12, 1915, to pay plaintiff his money on demand, as agreed, the majority opinion advances this line of argument:

1. That the case at bar differs materially from the *Hicks-Gainness* case, 269 U. S. 271, where this court, in a decision handed down at the last term (October, 1925), held that in a suit by a citizen in our courts under the Trading with the Enemy Act (just as this suit is), to recover in our courts in an action upon an account stated by a German debtor for German marks; payable not in Germany but in this country, that the date when the account was so stated, but was not paid (the breach date), was the proper date for converting these German marks into American money for purposes of judgment; this, for the reason, says the majority opinion in that case, the German marks were payable in this country; while, in the case at bar they were payable in Germany; and, therefore, the defendant, German bank in the case at bar, did not owe any duty whatsoever to the plaintiff under our law upon the date of demand and refusal made in Germany by respondent, an American citizen, to pay his deposit on June 12, 1915; since, says the majority opinion, the defendant, German bank, was not at that date (date of demand and refusal to pay so made in Germany), subject to our jurisdiction; and that the only liability this German bank incurred by such failure to pay on such demand was only such liability as the German bank at that time, June 12, 1915, incurred by reason of such failure to pay at that

time under the contract and *German law* to the exclusion of our law; and, that this German bank has incurred no additional or further liability or obligation since, or other than such as accrued against it and existed in favor of respondent on such breach date, June 12, 1915, the date of demand and refusal to pay in Germany; that a suit in this country is based upon an obligation or liability existing under the foreign law, as at the time when suit is brought; and, such *obligation* or liability is not at all enlarged or extended or increased by the mere fact that the creditor happens to be able to catch his debtor here (citing as authority for this last argument: *Davis v. Mills*, 194 U. S. 451; and *Western Union Tel. Co. v. Brown*, 234 U. S. 542).

2. That when the German bank failed to pay on demand so made in Germany, by respondent on June 12, 1915, while in Germany, the defendant bank's liability was fixed at a certain number of German marks; both by the terms of the contract and German law; and this number of German marks so fixed at that time was not to be increased or decreased in any particular by reason of what value that particular number of German marks might or might not happen to have at that particular time in the commodities or the currencies of any other countries whatsoever.

3. That at all times this liability of the German bank to compensate respondent in damages for its failure to pay this particular number of German marks on June 12, 1915, as demanded by respondent while in Germany on that date could be fully and lawfully satisfied and discharged by the *specific* payment of that *specific* number of

German marks at any time; of course, with whatever interest might have accrued; and, this too, regardless of how much the marks might have fallen in value or risen in value during the interval between such date of demand and refusal, June 12, 1915, and time of such actual payment of this particular number of marks (citing as authority therefor *Societe des Hotels le Touquet Paris Plage v. Cummings*, (1922) 1 K. B. 451).

4. That an obligation in terms of the currency of a country takes the risk of that country's fluctuations; and whether the debtor or creditor profits by such fluctuations at time payment is made the law which establishes such currency, pays no attention whatsoever to such fluctuations (citing the *Legal Tender* cases, 12 Wall. 457, 548, 549); that if the debt had been payable in this country and the value of dollars had decreased or increased before suit was brought, plaintiff could recover no more dollars by reason of such decrease or increase in value of American dollars; and, hence, it is not fair that a foreign debtor should be treated any differently.

5. That there was so little discussion of what the majority opinion regards as the principles which ought to govern the question, it refrains from citing the many cases upon such principle, but rests content with simply stating what seems to be the proper rule.

6. That *Sutherland v. Mayer*, (May 24, 1926) 70 L. Ed. U. S. Supreme Court Advance Sheets 581, differs materially from the case at bar in that the *Mayer* case concerned a settlement of accounts of a German partnership which had one member in Germany and one in America and dealt with this German partner's funds in

America until seized by this Government under the Alien Enemy Act; and as to the American partner's lien upon that fund the partnership contract might be fairly regarded as subjecting the German partner to American law, and justifying a settlement by reducing the German marks to American money as of the date when after the war it became lawful to transact business between Germany and America,—taking the mark at its value as at that time. (Citing *Hicks v. Guinness*, 269 U. S. 271.) The majority opinion disposes of the *Sutherland* case in this fashion, notwithstanding that case was decided by a unanimous court, and the opinion quotes with approval from *Labeaupin v. Crispin*, 2 K. B. 714, and says:

> "and the rule is the same whether the contract is to be performed in England or out of England, on the ground that there should not be varying rules in such cases."

6. And, finally, the majority opinion again states that since we are lending our courts to enforce an *obligation* to pay damages for breach of contract to pay German marks arising under German law alone; that, therefore, we ought to enforce no *greater obligation* than exists by the law of Germany at the moment when the suit is brought.

I.

In *Hicks v. Guinness*, Mr. Justice Holmes, the author of the majority opinion, said:

> "We are of opinion that the Courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. The debt was due to an American creditor and was to be paid in the United

States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors, You are too late to perform what you have promised and we want the dollars to which we have a right by the law here in force. Gould v. Banks, 8 Wend. 562, 567, 24 Am. Dec. 90. *The event has come to pass upon which your liability becomes absolute as fixed by law.* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543, 47 L. ed. 1171, 1173, 23 Sup. Ct. Rep. 754. *There is no doubt that this rule prevails in actions for a tort,* Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599, *and in actions for the failure to deliver merchandise.* Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218. *The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is 'the loss of what the contractor would have had if the contract had been performed'*, Chicago M. & St. P. R. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 100, 64 L. ed. 801, 803, 40 Sup. Ct. Rep. 504; *it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time. The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and on the other hand the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come seems to us to flow from fundamental theory and not to need other support. It is in accord with the decisions of several State Courts and Circuit Courts of Appeal as well as of the English House of Lords.* Hoppe v. Russo-Asiatic Bank, 235 N. Y. 37, 138 N. E. 497; Katcher v. American Exp. Co. 94 N. J. L. 165, 171, 109 Atl. 741; Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 255, 116 N. E. 636; Wichita Mill & Elevator Co. v. Naamlooze Vannootschap-Grebs Van Den Bergh's Industrie En Handelmaatschappy, 3 F. (2d)

931; The Celia v. The Volturno, (1921) 2 A. C. 544, 20 A. L. R. 884-H. L."

It seems to us that the foregoing reasoning should logically apply to the facts of the particular case at bar; for the opinion in the *Hicks* case clearly recognizes marks when expressed in American money as no longer German marks but commodities; and holds that upon breach of contract to pay or deliver German marks in this country, if the contract was made and payable here, the creditor need not take specific marks but may insist upon recovering their value expressed in the money of our country. Applying the language of the court in the *Hicks* case, we have: The debt was due to an American citizen, but was to be paid in Germany; when the contract was broken by a failure to pay, the American citizen had a claim *in Germany*, not for the debt, but at his option for damages for breach of contract to pay him a specified number of German marks; and right here is where, in our humble opinion, the majority opinion strays from what we understand the law to be as applicable to such cases; the majority opinion assumes that plaintiff had no real, substantial right to a cause of action in the courts of this country, as contradistinguished from the courts of Germany, to recover his damages for the German bank's breach of contract; respondent here had a right to use the language of the *Hicks* case, to say to his debtor, the German bank, you are too late to perform in Germany what you in Germany promised by your contract and what the German law gave you a right to do—pay me a specific number of marks you agreed to pay—you did not pay as your contract and German law required you to do—pay upon demand; I have a right to sue you either in my own

country or in any other civilized country, and have the courts of such civilized countries, other than Germany, give me a judgment, expressed in the currency of their country for what your German marks were worth in Germany, and in every other civilized country, on the date which you should have delivered to me that specific number of German marks, viz.: on June 12, 1915, and to which I had a right under the law of Germany, and the law of all other civilized countries.

The event has come to pass upon which your liability under the law of Germany and every other civilized country became absolute and as fixed by this law, I have a right under the comity of nations—private international law— to sue you in the courts of any civilized country; and, especially, in the courts of my own country, which afford me this right; not only under the law of the comity of nations— private international law—but by their particular statute, the Trading with the Enemy Act; which, especially, provides that a suit may be instituted to recover a debt claimed against an alien enemy. (Sec. 3115½ U. S. Compiled Statutes of 1918, Compact Ed.)

As said in the *Hicks* case, the rule applies in actions for the failure to deliver merchandise (and the *Hicks-Guinness* case was an action to recover damages for the failure to deliver *German marks*); the opinion in the *Hicks* case said the principle is the same whether the contract be for the payment of marks or merchandise; it is *the loss for which the plaintiff is entitled to be indemnified; the loss of what the contractor would have had, if the contract had been performed; and it happens at the moment when the contract is broken* (viz.: in the case at

bar June 12, 1915); just as it does when a tort is committed and the plaintiff's claim is for the amount of that loss valued in money of the forum at that time (June 12, 1915). "*The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and on the other hand the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come seems to us to flow from fundamental theory and not to need other support. It is in accord with the decisions of several State Courts and Circuit Courts of Appeal, as well as of the English House of Lords.*"

The *Hicks* case, in support of this holding, cites some of the same cases cited by the minority opinion, and the same cases cited by us in our brief. But, says the majority opinion in the case at bar, the *Hicks-Guinness* case cannot apply; for the reason that the account stated and upon which the cause of action arose in that case was stated in America; though payable in German marks; but says the majority opinion, you cannot apply the same reasoning used in the *Hicks* case, to the case at bar, because the German marks were payable in Germany in the case at bar; and it says this, notwithstanding the law of all civilized countries, recognizes the right of one who has been damaged by the breach of a contract in one civilized country to resort to the courts of all other civilized countries to recover damages for such breach of contract; provided such contract is one neither expressly nor by the policy of the law of the forum not prohibited; or, as expressed in the books in the following manner:

"Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

Dennick v. New Jersey Cent. R. Co., 103 U. S. 11, 18, 26 L. Ed. 439.

"The principles on which an action based on a foreign law will be entertained have been well stated as follows: 'These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State, or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction.'"

Higgins v. Central New England etc. R. Co., 155 Mass. 176, 180; 29 N. E. 534; 31 Am. S. R. 544.

"Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state where the action is brought, nor contrary to abstract justice nor pure morals nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions ex contractu and actions ex

delicto. In all such cases, the right to recover is governed by the lex loci and not by the lex fori."

Reynolds v. Day, 79 Wash. 499, 502; 140 P. 681; L. R. A. 1916-A 432.

"While comity is voluntary and not obligatory, and cannot supersede discretion, yet it rests upon a much broader principle than that of mere accommodation or courtesy. It may be said almost to be a part of the international law of civilized nations. Upon it rests to a large extent the right of property. The security of this right can only be guaranteed through the sacredness of the contractual relation. The right of a citizen to enforce his contract, valid where made, and to protect and reclaim his property wherever found, is founded upon principles as broad as the domain of justice itself. The protection afforded to property rights through the comity of states and nations is essential to the security of interstate and international commercial transactions."

Studebaker Bros. Co. v. Mau, 14 Wyo. 68; 82 P. 2.

"Comity * * * extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations."

Augusta Bank v. Earle, 13 Pet. (U. S.) 519, 589; 10 L. Ed. 274.

"We are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation

admitted to have arisen by the law which governed the conduct of the parties."

Walsh v. New York etc. R. Co., 160 Mass. 571, 572; 36 N. E. 584; 39 Am. S. R. 514.

"The civilians have divided statutes into three classes, personal, real, and mixed. By statutes, they mean, not the positive legislation, which in England and America is known by the same name, viz.: the acts of Parliament and of other legislative bodies, as contradistinguished from the common law; but the whole municipal law of the particular state, from whatever source arising. Sometimes the word is used by them in contradistinction to the imperial Roman law, which they are accustomed to style, by way of eminence, the common law, since it constitutes the general basis of the jurisprudence of all continental Europe, modified and restrained by local customs and usages, and positive legislation."

Story Conf. Laws, (4th Ed. Sec. 12).

To the same effect are:

Hilton v. Guyot, 159 U. S. 113, 164;

Wharton on the Conflict of Law, Vol. 2, 3rd Ed., pp. 938-944, sec. 428-a; pp. 944-951, secs. 429-430;

Langdon v. Young, 33 Vt. 136, 139;

12 *C. J.* pp. 438, sec. 11.

From the foregoing it is plain that the cause of action being one simply for damages for breach of contract to pay or deliver a certain number of German marks in Germany; a transitory action as termed by these cases and text books and following the person of the creditor into whatever civilized country he may visit; especially his own country, as did plaintiff in the case at bar; and, that such right to recover such simple damages not being at all dependent upon any peculiar or special statute

of the foreign country, where the cause of action arose; and such cause of action being enforceable under the laws of this country under the well established rule of comity, as well as the alien enemy act, was just as much subject to enforcement under the laws of our country on June 12, 1915, the breach date, as it was enforceable in Germany under the laws of Germany. In fact, it seems to us that the argument advanced in the opinion of the court in the *Guinness* case is unanswerable as applied to the facts in the case at bar.

In the *Hicks* case it is said, that when the contract was broken by a failure to pay German marks the plaintiff had a claim, not for the debt, for specific German marks; but for *damages* and these damages were to be expressed in the currency of the forum; you, Mr. Debtor, are too late to perform what you promised; you did not tender or make payment of these German marks in Germany at the time you agreed to do so—upon demand; that you never have done so; therefore, we want the dollars, if suing in America, or pounds sterling, if suing in Great Britain, to which we have a right to the law of such forum. The event has come to pass upon which your *liability* became absolute on June 12, 1915, the date you agreed under your banking contract to pay upon demand, as required by law; you had an opportunity up to June 12, 1915, to tender me the specific number of German marks which I had on deposit and which you agreed under your contract and which the German law required you to pay me; but you broke your contract; you did not do as you agreed to do; and you never have done so, or offered to do what you agreed to do; and I want my damages for

your breach of contract and these damages as expressed in the currency of the country where I am entitled to sue you. I do not want any more marks than you agreed to pay me on June 12, 1915; but I do want, and am entitled by the law of Comity of Nations and Private International Law of Nations, to have my judgment for such damages expressed in the currency of the country where I find you and where I have sued you. Your marks expressed in the forum of such country must necessarily be treated as if they were merchandise; for the principle of law is the same, whether it be merchandise or marks (*Hicks v. Guinness* case); the loss which I have suffered and am entitled to be indemnified for is the loss I would have had, that is the number of German marks if you had performed your contract as you agreed to do on June 12, 1915, and which you did not perform (*Hicks v. Guinness* case); and this loss happened to me on the very instant of the very day when you broke your contract, June 12, 1915, by failing to tender to me or pay me these specific German marks, just as if you had personally injured me (*Hicks-Guinness* case); and my claim is for the amount of that loss, as of that date, valued in money of the country of the forum where I find you and where I have a right to sue you, according to the law of all civilized countries. This, says respondent, is in accord with the decisions of both English and American courts and which I am entitled to invoke against you. (*Hicks-Guinness* case.)

From the foregoing, it is clear that upon the breach date, June 12, 1915, plaintiff had a cause of action for breach of contract to pay his deposit account, against this German bank in the courts of this country, as well as in

the courts of Germany; provided he could at that time have caught the German bank here; for it does appear that the cause of action is transitory and is of such a character as is recognized and enforceable everywhere in all civilized countries; and, it also appears, it seems to us, beyond the shadow of a doubt, that it was the identical obligation or liability which plaintiff sought to enforce when he commenced his suit on July 9, 1921, in this country, as that obligation and liability existed against the German bank on June 12, 1915, viz.: *the obligation and liability upon this German bank to pay such damages as* respondent had sustained and suffered on that date, by reason of the bank's failure to pay on demand, as it had agreed to pay; and as its contract and the German law compelled it to pay; and this was just exactly the same obligation and the same liability imposed upon it, as was imposed upon it by the laws of our own country had plaintiff instituted suit against this German bank in this country on June 12, 1915, as he had an absolute right to do; and it was just the same identical liability and obligation which plaintiff is now relying upon, and was relying upon on July 9, 1921, when he instituted this present suit. Plaintiff has invoked no other obligation or liability, whatsoever, than the obligation and the liability resting upon the German bank at all times to pay him his damages for its failure to deliver the identical number of German marks which were due him under the contract between him and the German bank and according to the German law as it existed on June 12, 1915.

It is true respondent asks that this damage be fixed as of the breach date, June 12, 1915, as all law; and espe-

cially the law, as announced in the opinion of this court in the *Hicks* case, fixes as the date for fixing such damages; of course these damages cannot for purposes of an American judgment be expressed in German marks; but they must be for German marks as of such value expressed in American dollars as of that date; this is all that both of the lower courts did; and all that the minority opinion says should be done; and all that all the great weight of authority of both English and American courts says respondent was entitled to have done.

Throughout the whole majority opinion it is the mere fact that German marks just happened to have a higher value on June 12, 1915, the breach date, than they had at the time plaintiff happened to bring his suit (July 9, 1921), which influenced the majority opinion in holding that it was a greater obligation, or greater liability imposed upon the German bank by the lower courts than was imposed by the German law and the bank's contract; for both the lower courts found the identical number of marks as due plaintiff as was admitted by the German bank. There was no dispute in this court as to the number of marks due on June 12, 1915. No statute of limitations or doctrine of laches has been invoked in this court, or at any other time against respondent; hence, had suit been brought in Germany the judgment would have been expressed for the identical number of German marks as these lower courts have found due respondent. It is not a case of our courts being called upon or requested to enforce, or as having enforced, some peculiar *sui generis* statute so to speak of Germany; or some *penalty* statute of Germany which created or gave plaintiff some special

cause of action when none existed without such statute; such as the two cases cited by the majority opinion in support of the argument that it was a *greater obligation* or *greater liability* enforced by the judgment than was incurred on June 12, 1915, under the German law, and the contract between the parties when the German bank failed and refused to pay. The two cases referred to by the majority opinion in support of its contention that the judgment as rendered by the lower courts was different from, greater than, and an enlargement of the *obligation and liability* of the German bank as it existed at the time of the breach, June 12, 1915, are (*Davis v. Mills*, 194 U. S. 451, and *Western Union Tel Co. v. Brown*, 234 U. S. 542).

The *Davis-Mills* case was an effort to hold citizens of Connecticut liable for a statutory penalty given by a Montana statute, where at the time of the commencement of the action and trial of the suit in Connecticut this penalty under the statute of Montana was barred by a statute of limitations which was enacted by the Montana law, subsequent to the accruing of the cause of action on the penalty statute; in that case this court properly held that the later statute of limitations applied in Connecticut; that the penalty could not be enforced under the laws of the sister State of Connecticut as it was barred by the Montana statute; but that decision has no application here, for the obligation of the German Bank is not by virtue of any particular or peculiar or *sui generis* statute, so to speak of Germany; none is in the record; none is cited and there is no statute of limitations or laches invoked against plaintiff's right to recover. In this *Davis-Mills* case, Mr. Justice Holmes says:

"May a defendant in an action of the kind specified in Section 554 of the Code of Civil Procedure of Montana, avail of the limitation therein prescribed, when the action is brought against him in the Court of another state?"

He held that the answer to the question was in the affirmative, and in support of his answer said:

"*The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligato, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts.* But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater v. Mexican Nat. R. Co., 194 U. S. 120, ante, 900, 24 Sup. Ct. Rep. 581. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the lex fori, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the

newly created liability so specifically as to warrant saying that it qualified the right." (Italics are ours.)

Davis v. Mills, 194 U. S. 453.

The other case cited and referred to (*Western Union Telegraph Co. v. Brown*, 234 U. S. 542) was an action brought in the Federal Courts of South Carolina to recover for mental suffering damages, under a statute of that state which permitted such recovery. Defendant telegraph company had failed to deliver a telegram sent to one living in Washington City, District of Columbia, announcing the death of this person's sister in South Carolina, whereby the person to whom the telegram was directed, plaintiff, was prevented from attending the funeral of his sister in South Carolina; his mental suffering consisted in the suffering, he alleged he sustained by reason of not being able to attend his sister's funeral in South Carolina. This court, very properly, as it seems to us, held there was no such law in the District of Columbia where the tort, as the opinion calls it, accrued,—failure to deliver the telegram, and where plaintiff's damages, if any accrued, making mental suffering a cause of action, and denied any relief; the following language was used by the same learned Justice who wrote the majority opinion in the case at bar, as follows:

"Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 126, 8 L. ed. 900, 902,

24 Sup. Ct. Rep. 581; Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 480, 56 L. ed. 274-276, 38 L. R. A. (N. S.) 40, 32 Sup. Ct. Rep. 132. (A limitation of liability may stand on different grounds. Oceanic Steam Nav. Co. v. Mellor, May 25, 1914 (233 U. S. 718, ante, 1171, 34 Sup. Ct. Rep. 754). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a state attempts in this manner to affect conduct outside its jurisdiction, or the consequences of such contract, and to infringe upon the power of the United States, it must fail. The principle would be illustrated by supposing a direct clash between the state and Federal statutes; but it is the same whenever the state undertakes to go beyond its jurisdiction into territory where the United States has exclusive control. Western U. Teleg. Co. v. Chiles, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. Rep. 613; see also Western U. Teleg. Co. v. Commercial Mill. Co., 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L. R. A. (N. S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815."

But these cases present entirely different sets of facts from the case presented by the record in the instant case. The laws of all civilized countries, so far as we have been able to find, enforce contractual rights between parties and recognize the right of one party to recover his damages for breach of contract entered into in another civilized country. It is but the enforcement of this obligation growing out of the breach of this particular contract to deliver or pay to plaintiff German marks upon demand, that the action at bar is based; and the identical cause of action upon which he recovered. This record presents no question of any extension of the obligation incurred by this German Bank on June 12, 1915,

by such refusal after demand of payment. It is the identical and the same obligation which existed on June 12, 1915, upon which this plaintiff is now seeking redress before this court; and the very same he was seeking when he instituted his suit on July 9, 1921; the mere fact that the German marks happened to be worth more on the breach date, when the obligation upon the bank to pay the money or to pay damages for failure so to pay occurred, makes no difference. That is but an incident of the procedure in enforcing the obligation in this country, just the same as the rate of interest in this country upon the judgment recovered is an incident to the suit; for instance, the rate of interest prevailing in Germany on the breach date, or the present date, is far less than the rate of interest prevailing in California, which is seven per cent; and likewise, the rate of interest prevailing in some of the states is less than that prevailing in California; but when a plaintiff recovers a judgment in California based upon an obligation accruing or fixed by the law of another state, as an incident to that judgment he is entitled to have interest upon such judgment figured according to the rate of interest prevailing in California; even though the suit is in the Federal Court; this, by virtue of Federal law. But, could it be said that, because of such recovery of interest by a plaintiff in California he is enforcing a greater obligation or greater liability than existed at the date of breach; simply because the rate of interest happens to be greater in the jurisdiction where the obligation is enforced, than in the jurisdiction where the obligation arose?

II.

Again, referring to the *Hicks-Guinness* case: when the contract of the German Bank to pay plaintiff his deposit account was broken on June 12, 1915, by its failure or refusal so to do upon plaintiff's demand, plaintiff had a claim, not only in Germany, but in America, England and every other civilized country, provided he could catch the German Bank in those jurisdictions; for his action was transitory and followed him into these civilized countries, not for the debt, but, at its option, for damages for the breach of the German Bank to keep its agreement, both as expressly agreed in its contract with plaintiff and as required by the German law and the law of every other civilized jurisdiction; and these damages expressed not in German marks, but in the currency of the country of the forum, America or England, and expressed in dollars or pounds sterling; for how much? for

> "the loss for which the plaintiff is entitled to be indemnified is the loss of what the contractor would have had if the contract had been performed" * * * Citations. (Hicks-Guinness.)

> "It happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time. The inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions, and, on the other hand, the momentary interest of the country of the forum may be in favor of taking the date of the judgment, but the conclusion to which we come seems to us to flow from fundamental theory and not to need other support." (Citing cases.) (Hicks-Guinness.)

It is in accord with the decisions of several State Courts and Circuit Courts of Appeal, as well as of the English House of Lords. (Citing numerous American—Federal and State—and English cases.) (Hicks-Guinness.)

III.

But, it is said in the majority opinion when the defendant bank failed to pay on demand made on June 12, 1915, by plaintiff while in Germany, the defendant bank's liability was fixed at only a certain number of German marks; both by the terms of the contract and German law, and that this number of German marks at that time was not to be increased or decreased in any particular whatsoever by reason of what value that particular number of German marks at that time happened to have in the commodities or the currencies of any other country whatsoever; that at all times this liability of the defendant, German Bank, to plaintiff to pay for its failure to deliver the identical number of German marks to plaintiff on June 12, 1915, as demanded by him while in Germany on that date, could be fully satisfied and discharged by the mere payment of that specific number of German marks at any time; of course, with whatever interest might have accrued; regardless of how much the marks might have fallen in value as compared with other things, during the interval between such date of demand and refusal, June 12, 1915, and time of such actual payment of this particular number of German marks, citing as authority therefor *Societe des Hotels le Touquet Paris Plage v. Cumming* (1922), 1 K. B. 451.

But it seems to us that this argument in the majority opinion also overlooks the fact as pointed out in the foregoing quotations from decisions and text writers that plaintiff's cause of action for breach of his contract to pay German marks in Germany upon demand is such a cause of action as is enforceable by right of comity in this country; and that, when the breach day occurred and there was no compliance with the demand, plaintiff had a right, as he did subsequently do on July 9, 1921 (and which postponement of bringing his suit was not objected to as contrary to any statute of limitations or rule of laches), to sue upon this obligation, or this liability of the German Bank, to pay him; not the specific number of German marks as agreed, and as the German Bank could have required him to take on the due date in Germany, but plaintiff was entitled to say, no, pay me a judgment for failure to deliver, or pay me this identical number of marks which you owed me on July 12, 1915, when I demanded them and which you failed and refused to deliver to me; and compensate me for the loss thereof, expressed in American money for the value of such marks, as if you had delivered them to me as you were required to do on June 12, 1915; for that is the date on which you broke your contract and it is to indemnify me for the loss which I suffered on that date which you should pay. Otherwise, you, the German Bank, will be profiting at my expense by your own wrong, viz.: wrongfully withholding from me, according to your contract and your German law, that which you agreed, and should, under your German law, have delivered to me; but which you failed, for reasons best known to yourself, to do. You have had these marks all this period specu-

lating with them and using them over and over again to your own financial gain and to my loss; and now I must take them in your depreciated currency which is but a scrap of paper.

While it is true that the German Bank's obligation was fixed at a certain number of German marks, both by contract and by law, and was not to be increased or decreased in any particular by what value these particular German marks happened to have in the commodities or currencies of other countries; and that this German Bank could have satisfied plaintiff's demand for payment of this particular number of German marks in Germany, with such interest as may have accrued thereon, and such as may have been allowed by German law, regardless of whether they had risen or fallen at the time of such payment; yet, this line of argument, it seems to us, overlooks this material fact which we have just been speaking of; namely, that the suit could have been brought in any other country upon such demand just as well as in Germany; and that after such breach date it was *damages* to which plaintiff was entitled, as especially pointed out in the opinion, where it says:

> "Here we are lending our courts to enforce *an obligation (as we should put it to pay damages)* * * *" (Italics are ours.)

In support of its contention that this liability on the part of the German Bank was one in marks alone, and was open to satisfaction by the payment of that number of marks at any time, with whatever interest might have accrued, however much the mark might have fallen in

value as compared with other things, the majority opinion refers to

Societe des Hotels Du Touquet-Paris-Plage v. Cumming (1922), 1 K. B. 451.

There an Englishwoman while in France incurred a hotel bill; she did not pay it; gave a due bill for it; left France; returned to England; was sued in the English court by this French hotel company for her indebtedness; she answered; thereafter and while the action was pending, upon the suggestion of her English solicitors, she personally visited France taking the identical number of francs which she owed; paid them to a representative of the hotel company who knew nothing of the litigation or of the transaction; this representative received and accepted this identical number of French francs owed by her to the French hotel company (3 K. B. 459 (1921)); her answer was then amended in this English suit against her by setting up payment and accord and satisfaction.

The case was tried in the lower court by Lord Avory; he quickly disposed of the plea of accord and satisfaction; held that the payment under the circumstances did not constitute such; then disposed of the case upon the question as to when the judgment should be reduced to English money for the purpose of the judgment; quoted the language of Lord Eldon from *Cash v. Kennion* (11 Ves. 314, 316), which same language is quoted in the minority opinion, which is as follows:

> "I cannot bring myself to doubt, that where a man agrees to pay 100£ in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him

just as much as he would have had, if the contract had been performed."

Called attention to the fact that the same principle was adopted and applied by the Court of Appeals in the *Manners* case, 1 Ch. 581, 588, quoted approvingly from Lord Vaughan Williams as follows:

> "It seems clear that in an action in whatever form in the English courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—i. e., the amount payable according to the rate of exchange."

Quoted approvingly from *Scott v. Bevan*, 2 B. & Ad. 78, as follows:

> "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date at which that value must be ascertained is the date of the breach, and not the date of the judgment."

And Lord Avory concluded his opinion as follows (p. 463):

> "In my opinion those expressions apply with equal force to a claim for debt and to a claim for damages, and therefore upon the issue of the writ the plaintiffs

were entitled to recover 715£, subject to any defence to that claim.

"The authorities appear to me to show that when judgment is given, the amount due on the judgment must be converted into English currency, but not at the rate of exchange prevailing at that date. In my view they show that the plaintiffs being entitled to sue in an English court can claim payment in English currency at the rate of exchange prevailing when the debt fell due. The plaintiffs are therefore entitled to judgment for 715£, out of which credit must be given for Frs. 18,035 calculated at the rate of exchange prevailing in May, 1920, when this payment was made by the defendant."

When the case reached the upper court (1 K. B. 451), the three judges presiding were Lords Bankes, Scrutton and Atkin.

Lord Bankes, after stating the facts, said:

"Had nothing happened between the issue of the writ and the trial the respondents would have been entitled to the equivalent in English money of the Frs. 18,035 at the appropriate rate of exchange, whatever that might be." (p. 455.)

After calling attention to the fact that the Englishwoman and her husband went to the French hotel company in France and there tendered to its representative the identical number of French francs, 18,035, *which were accepted;* that she returned to England and her solicitors entered a further defence of payment of the claim in full after action was instituted; called attention to what he considered as material; namely, to notice that the claim was for the *debt only*, that the claim for interest which had been originally added to the writ (complaint), had been struck out, so that the claim after the amendment

of the writ (the complaint) and before payment "*was for the original debt and for that only*", said:

> "Under these circumstances the only material question for consideration is whether the plea of payment after action is established, and if established what the effect of it is." (p. 456.)

After reviewing a number of cases upon the question as to the effect of the payment of the exact number of French francs under the circumstances (456-458), said:

> "As the appellant has proved that she paid the amount of the debt, at the place at which, and in the currency in which, it was payable, and as the amount she paid was accepted and retained without protest or objection, I am of opinion that the plea that after action brought she satisfied the plaintiffs' claim by payment was made out, and that judgment should have been entered for the plaintiffs for nominal damages only."

Lord Scrutton also wrote an opinion, reciting the facts; severely censured the British solicitor for sending his client to make a payment to the French plaintiffs under the circumstances and behind the backs of their English legal representatives, and said (p. 459):

> "The questions are: (1) Is such a payment, when retained by the plaintiffs, accord and satisfaction, so as to be a defence to the action? (2) Were the plaintiffs, who received in France the amount of their debt in francs in 1920, entitled to claim in addition such a sum in English money as made up their receipts to the value of that number of francs in English money in 1914 when it was due? (p. 459.)
>
> "I take the same view as Avory J. that there was here no accord and satisfaction, including in my consideration the fact to which he does not specifically refer, that the plaintiffs kept the money and did not return it but went on with the action. But it does not necessarily follow that the plaintiffs were

> therefore entitled to the sum claimed. The day before the writ was issued, if the lady had tendered in France to the plaintiffs Frs. 18,035, could they have recovered more?" (p. 460.)

Called attention to the fact that the plaintiffs could not have recovered interest because the law of France does not give it and the debt was a French debt. In France it could not have been successfully pleaded that the French franc was of less value in English currency than it was on December 31, 1914; for the defendant was not bound to repay in English currency; calls attention to the fact that the writ (the complaint) was issued in England; asks, did this increase the damage; says, if the writ had been issued in Germany could the defendant have succeeded by paying the number of marks represented, 18,035, by paying them in 1914, though in 1921 that amount of francs represented a much larger number of francs; refers to *Pilkington v. Commissioners for Claims on France*, 2 Knapp P. C. 7 (bottom of page 460), a case where the French Government had confiscated assignats of English claimants worth fifty pence in English currency and had then agreed to make reparation; said the Privy Council, *obiter*, held that the French Government could not do so by simply restoring an equal number of assignats worth 20 pence; but must make good the difference between the value of the assignats at different periods. Called attention to the fact (p. 461) that an English claimant desired in that case compensation from English courts for wrong done him in France, said:

> "* * * and as personal property follows the domicil it may be that he was entitled to such an amount in English money as represented the value

to him in England of the property confiscated at the time of confiscation. But in this case a domiciled Frenchman desires damages for non-payment to him on the due date of a debt payable in France in French currency; can he increase the number of francs payable by saying that in one country French currency is worth less than it was at the agreed date for payment, though in other countries—e. g., Germany—it is worth more than it was at the agreed date? In my view, the plaintiffs, who were owed Frs. 18,035, payable in France, must be content with Frs. 18,035 paid in France. In the case of an English debt they would probably recover interest, but apparently French law which determines the incidents of a French debt excludes liability for interest. At the time of the payment the plaintiffs were in addition entitled to costs to date of payment, and, as explained in Cook v. Hopewell (1), to nominal damages. Judgment should, therefore, in my view, be entered for them for nominal damages with costs up to the time of the plea of payment of the debt. They have failed substantially since that plea, but as the difficulty has been brought about by the irregular act of the defendant in going behind the plaintiffs' legal advisers, and the defendant did not offer to submit to nominal damages but alleged accord and satisfaction in which she failed, there should be no costs of the action after payment in. The defendant must have the costs of this appeal."

Lord Atkin also wrote an opinion; he stated the facts, and said:

"The only question in the action was whether that plea was established. The original debt was contracted in France, by an Englishwoman living in England, to a French company, payable in France in French currency. There is no evidence as to French law differing from English law as to the legal consequences of such an obligation. In France the plaintiffs could have sued the defendant only for Frs. 18,035, and on payment of that sum the defen-

dant would at any time have discharged the obligation. *Inasmuch as the obligation to pay to the plaintiffs in France 18,035 francs was a personal obligation the plaintiffs would also have been entitled to sue the defendant in the courts of any country where they found her, provided that the municipal law of such country recognized personal obligation contracted outside its own territory, as would be the case in most states. The plaintiffs, therefore, have the right to sue the defendant in the English courts to recover the debt of Frs. 18,035 due to them in France. Judgment would only be given in the English courts expressed in English currency. At what date the exchange must be calculated is a matter of controversy that I need not deal with now. The action would be for a debt due in France just as, if the debt were due in England, it would be for such a debt. The legal position appears to me to be the same. If the plaintiffs had been an English company suing for a hotel bill of 1800£, it appears to me that, if before or after action brought the defendant paid and the plaintiffs received 1800£, the debt of 1800£ would be satisfied and discharged; if made after action brought a plea of such payment would be a good plea, and on being admitted or proved the plaintiffs would only be entitled to judgment for costs up to the date of the plea.* No doubt, technically the action for debt is for the debt and for nominal damages for breach of the promise expressed or implied, to pay on the due date. To satisfy the plaintiffs' right of action once vested there must be an accord and satisfaction. But nominal damages in respect of the non-payment of a debt are a fond thing vainly invented, 'a mere peg on which to hang costs': per Maule J. in Beaumont v. Greathead (1). If a man being owed 50£ receives from his debtor after the due date 50£, what other inference can be drawn than that he receives it in satisfaction of the debt, and what other result can follow than that the debt is discharged? It was suggested in the present case, though with some distrust by the plaintiffs, that for the purposes of the English court once a writ was issued the debt of

francs payable in France became a debt of sterling at the rate of exchange of December 31, 1914, payable in England, and that such debt was not paid. Counsel disclaimed the suggestion that on December 31, 1914, the defendant incurred a liability to the plaintiffs to pay them sterling in England. If such were the effect of the transaction, it would follow that the defendant on January 1, 1915, incurred obligations to pay to the plaintiffs sums in the manifold currencies of the many countries in the world where she might eventually be sued. *It appears to me that she was sued here for a French debt, and, if you please, for nominal damages, and that by paying the debt in France she discharged the debt for which she was sued in France, and in all other countries.* It is not suggested that she thereby discharged herself of the obligation to pay costs; in other words, the payment was not an accord and satisfaction of the action. It seems to me that the usual results should follow: the claim is discharged, the plaintiffs are not entitled to judgment for nominal damages any more than they would be if, having a debt for 1805£, they had received 1805£ in satisfaction and discharge of the debt. The plaintiffs should have their costs up to the date of the plea of payment. As I think that the defendant should not have been advised to take the course she did without communication with the plaintiffs' legal advisers, especially in view of the fact that the plaintiffs were foreigners, I agree that the defendant should not have the costs of the action after plea.

For the purposes of this action I have not thought it necessary to decide at what date the exchange should be calculated had the plaintiffs succeeded. The same result follows, though the exchange should be calculated as at the date when payment became due. But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the

debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve." (Italics are ours.)

Societe Des Hotels Le Touquet Paris-Plage v. Cummings, (1921) 1 K. B. 451-463-465.

We have quoted at length from this case, for we deem it of importance; but in sum and substance it simply means that the court on appeal held that *the actual payment as actually made was sufficient under the circumstances*, and the judges expressly refrained from deciding the one question before this court, where there is no contention whatever that there were any marks actually paid by the German Bank to plaintiff, or ever tendered to him.

The Court of Appeals (1 K. B. 451) left open the question which was most thoroughly disposed of by Lord Avory (3 K. B. 459) and which is the one question to be determined here. All that these judges decided on appeal (1 K. B. 451) was that the payment was received and accepted after suit was brought.

The decision in this case on appeal (1 K. B. 451) does not touch the one question under discussion. But Lord Avory's opinion (3 K. B. 459) does and in full accord with the lower courts, the minority opinion and the great weight of English and American cases—State and Federal; why, pray, should such a decision as that of the judges on appeal (1 K. B. 451) be used to overturn this great weight of authority and which appears to have been clearly and fully disposed of by the *Hicks-Guinness* case and the *Sutherland* case?

IV.

While it is true as stated in the majority opinion that an obligation in terms of the currency of a country takes the risk of currency fluctuations; and whether creditor or debtor profits by the change; the law takes no account of such fluctuations or of such profits. (*Legal Tender* cases, 12 Wall. 457, 548, 549.)

And while it is also true as so stated in the majority opinion, that in fact a dollar or a mark may have different values at different times, but the law which establishes such dollar or mark as legal currency of such country always remains the same; and, furthermore, is it also true, that if the German mark payable on June 12, 1915, and the value of American dollars had dropped, before suit was brought, the respondent could recover no more dollars on that account; but this line of reasoning does not recognize the distinction, which seems to us to be clear between the enforcement of an obligation, specifically, payable in terms of the money of the country of the forum; and, an obligation payable in the currency of a foreign country; but enforcible—either by express terms of the obligation—the contract—as in *Hicks-Guinness* case; or by right of comity of nations—private international law, in the forum where suit is brought; and this, too, whether this payment in the terms of the currency of a foreign country, is, actually, made by the contract payable in such foreign country; or in this country, the country of the forum; such as were the *Legal Tender* cases (12 Wall. 458, 548, 549) a simple case of a suit to recover the value of certain sheep which the defendant had bought at a confiscation sale conducted under the authority of the Confederate Government; and during

the trial plaintiff offered to prove what the difference was in value between specie (gold and silver money) and United States currency called greenbacks. Plaintiff did this for the purpose of showing that gold and silver had a greater value than greenbacks and for the purpose of allowing the jury to determine such difference between these two classes of money; defendant objected upon the ground that it was all United States money and made no difference in the case, whether there was really any intrinsic difference between the two classes of money or not, since they were both currency of the United States Government, and so recognized as such, that is paper money (greenbacks) and gold and silver. This court did what seems to us very proper: sustained the contention that there was to be no difference taken into consideration between these two classes of money—paper money—greenbacks—and the gold and silver coin; *because they were both recognized, and had the stamp of approval, as money by the Government of the forum—the Government of the United States.* That case seems to us, entirely different from the facts in the case at bar; and it seems to us that such difference is most clearly pointed out and shown by no less an authority than the learned Justice, the author of the majority opinion in the case at bar, and also the author of the opinion in *Hicks v. Guinness;* and in which opinion this whole court (Mr. Justice Stone not participating) concurred, and where it is said: When the contract (to deliver and pay under the account stated the exact number of the German marks as shown due under the account stated on the date that the account was stated) was broken by a failure to pay, the American firm had a claim here (plaintiff in the case at bar had a

claim here, since his cause of action arose out of a breach of such a contract as was recognizable and enforceable in the jurisdiction of every civilized country for such breach, under the law of comity, private international law, and in addition thereto subsequently by the Alien Property Custodian Act); not for that specific debt expressed in German marks; but at its option for damages expressed in the currency of the country of the forum. Plaintiff had a right to say to the German Bank, you are too late to perform what you promised and we want these German marks due under your contract as of June 12, 1915, when demanded and to which we have a right; not only by your German law and your contract, but by the law of the United States. The event has come to pass by which your liability becomes absolute as fixed by law. There is no doubt that this rule prevails in actions for tort (citing cases), and in actions for the failure to deliver merchandise (citing case).

The principle is the same in a contract for the payment of German marks. The loss for which the plaintiff is entitled to be indemnified is the loss of what the contractor would have had if the contract had been performed (citing cases); it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss, valued and fixed in the amount of money of the forum; expressing, though, the value of the foreign money as such value existed on the breach day, June 12, 1915; and, this, for the reason that the inconveniences and speculations that would be the result of a different rule have been pointed out in arguments and decisions and while the momentary interest of the country of the forum

may be in favor of taking the date of the judgment, but the conclusion that the breach date (June 12, 1915) fixes the time, "flows from fundamental theory", and "not to need other support". But it has other support in the full accord of the great weight of both English and American cases—federal and state—the support of the two lower courts and that of the minority opinion.

As to the majority opinion's suggestion that a foreign debtor should be no worse off than such a debtor, as was the plaintiff in the *Legal Tender* cases (12 Wall. 457, 548, 549), it seems to us that such foreign debtor under the circumstances of this particular case is not in the same class. He contracted, while it is true, to pay in his own country and in the currency of his own country a certain number of marks of that currency; yet, he so contracted under a plain, simple contract; and agreed under the law of his country; as well as under the law of other civilized countries; that, if he broke this simple contract to pay, he subjected himself not only to the law of his country for its enforcement, but also to the law of his country's sister countries, so to speak; provided, of course, he, this foreign debtor, could be found within their jurisdiction; and, he well knew, that currency of one country, when spoken of in the terms of another country is, as it were, but an article of merchandise; and when its value is to be expressed in the terms of the currency of a sister country, such value can, only in the very nature of things, be expressed in the terms of the currency, of such other country, by reducing it; just as any other commodity of merchandise to the value as expressed in the currency of such other country, viz., its value as expressed in the currency of such other country,—(the forum)—as, of such value,

on the date of breach of contract. (June 12, 1915.) Such seems to be the law, by the great weight of authority, of every civilized country upon the subject.

V.

As to the suggestion that there has been such little discussion of what is regarded by the majority opinion, as the principles which ought to govern the question; we, humbly, have to say that we assumed the question was fully disposed of by this court after its decision in the *Hicks-Guinness* case, 269 U. S. 71; where the court, expressly held that the value of German marks was to be estimated in American dollars for purpose of the judgment, as at the time when an account was stated in America, payable in marks in America, to an American creditor; and, where this court, had also just decided as we read, and thought we understood in

Sutherland v. Mayer, (May 24, 1926), 70 L. Ed. U. S. Advance Sheets 580,

when it said, in, apparently, unmistakable language, in referring to *Lebeaupin v. Crispin*, (1920) 2 K. B. 714:

> "In fixing the date upon which exchange should be calculated, the inevitable delay which must result before a judicial taking of the account must be given weight. If the liability be treated as having crystalized at the time indicated above, then a definite date is fixed for the ascertainment of exchange and the amount when found may be awarded without regard to the fluctuations in the possible date of accounting. (Citing Lebeaupin v. Crispin.) In England the rule has been applied in a winding up proceeding upon the ground that a date must necessarily be fixed on which liabilities are to be treated as definitely ascertained

for the purpose of properly conducting the later winding-up of the company's affairs. Re British American Continental Bank, supra, p. 582 (1922), 2 Ch. 575). *And the rule is the same whether the contract is to be performed in England or out of England, on the ground that there should not be varying rules in such cases.*" (Italics are ours.)

VI.

Finally, with reference to the last paragraph of the majority opinion, where it is said that:

> "Here we are lending our courts to enforce an obligation (as we should put it, *to pay damages*) arising from German law alone and ought to enforce no greater obligation than exists by that law at the moment when the suit is brought. (Italics ours.)

We can add but little to what we have already said; other than to reiterate, that it appears to us, that this court has already disposed of this question, affirmatively, in favor of the decree of the lower court; by the unanswerable logic of the opinion of this court as expressed by Mr. Justice Holmes in *Hicks v. Guinness*, 269 U. S. 271; and the unmistakable language of Mr. Justice Sutherland in *Sutherland v. Mayer*, (May 24, 1926) 70 L. Ed. 581; in neither of which cases was there any dissent; Mr. Justice Stone simply taking no part in the decision of the *Hicks-Guinness* case.

In conclusion, we can make no stronger argument, than to repeat the illustration, which we made in the fore part of this petition, namely: assume that on July 9, 1921, the date respondent brought his suit; and the date which the majority opinion fixes for reducing marks to American

money, for purposes of the judgment, German marks had been of the identical value as they actually were on June 12, 1915—the breach date; and the date which the lower courts fixed as date for reducing them to American dollars, for purposes of the judgment, and when such marks had a *substantial value*, rather than an *insignificant value* —such as they actually had on the date of bringing suit; and, furthermore, assume that the same German marks had been on the breach date of no greater or higher value than they actually had on the date of judgment, July 9, 1921, namely: *no value*. What kind of argument would the majority opinion use to uphold its conclusion that taking the breach date, when the marks had less value than they had on date of bringing suit, constituted the enforcing of a greater obligation or greater liability against the German bank than it was under to respondent on the breach date?

Dated, San Francisco,
December 24, 1926.

Respectfully submitted,

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN D. ZIMDARS,
Counsel for Respondent and Petitioner.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

We, the undersigned, William P. Hubbard, William Grant and John B. Zimdars, counsel for respondent in the above entitled suit hereby certify that the within petition is presented in good faith and not for delay.

Dated, San Francisco,
December 24, 1926.

WILLIAM P. HUBBARD,
WILLIAM GRANT,
JOHN D. ZIMDARS,
Counsel for Respondent and Petitioner.

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
City and County of San Francisco.—ss.

W. J. De Martini being duly sworn, deposes and says: that he is a citizen of the United States and a resident of the City and County of San Francisco, State of California, and is associated with William P. Hubbard, one of the counsel for respondent in the above entitled matter; that on December 24, 1926, he deposited two copies of the petition for rehearing in the Post Office at the City and County of San Francisco, State of California, properly enclosed in a sealed package and plainly addressed to Messrs. Peaslee, Brigham & Gennert and to Amos J. Peaslee, counsel for petitioner bank, at their place of business No. 501 Fifth Avenue, in the City of New York, State of New York, and caused the same to be registered by the Post Office Department of the United States Government at said City and County of San Francisco, and prepaid the postage thereon, and that on the same day, he deposited two copies of the foregoing petition for rehearing of respondent, addressed to Hon. William D. Mitchell, Solicitor General of the United States of America, at Washington, D. C., and caused the same to be registered by the Post Office Department of the United States Government, at said City and County of San Francisco, and prepaid the postage thereon; that there is a United States Post Office at the City and County of San Francisco, State of California, and also one at the City of New York, State of New York, and one at the City of Washington, District of Columbia, and between the said City and County of San Francisco and the said City of New York and the

said City of Washington there is a regular daily communication by mail.

W. J. DE MARTINI.

Subscribed and sworn to before me this 24th day of December, 1926.

(Seal)

Flora Hall,
Notary Public in and for the City and County of San Francisco, State of California.